Supreme Court, U.S.
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No. 00-1012

IN THE

Supreme Court of the United States

KARUK TRIBE OF CALIFORNIA, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT HOOPA VALLEY TRIBE

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QUESTION PRESENTED FOR REVIEW

While reorganizing administration of California Indian affairs in 1864, Congress statutorily authorized the President to "set apart . . . and at his discretion, not exceeding four tracts of land . . . to be retained by the United States for the purposes of Indian reservations. . . ." The Court of Federal Claims held that neither the 1864 Act nor any subsequent act of Congress or the Executive indicated Congress' intention to convey a permanent interest in lands so set aside. The question presented is whether the court of appeals erred in affirming the Court of Federal Claims' conclusion that in the 1864 Act Congress did not intend to convey a compensable interest in public lands when it delegated broad discretion to the President to set aside lands to accommodate California Indians.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 209 F.3d 1366 (Fed. Cir. 2000), and is set forth in petitioners' Appendix at 1a-37a. The opinion of the Court of Federal Claims is reported at 41 Fed. Cl. 468 (1998), and is set forth in petitioners' Appendix at 38a-56a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. IV, § 3, cl. 2 (Property Clause):

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .

U.S. Const. amend. V (Takings Clause):

> [N]or shall private property be taken for public use, without just compensation.

An Act to provide for the better Organization of Indian Affairs in California, Act of April 8, 1864, 13 Stat. 39, App. at 60a-62a:

> [T]here shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white

> settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended. . . . *And provided, further*, That said tracts to be set apart as aforesaid may, nor may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent, as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

STATEMENT OF THE CASE

This litigation is yet another chapter in the dispute over two tracts of land, known as the "Square" and the "Addition," located in rugged northern California. The Square and the Addition, collectively known as the Joint Reservation, were set aside by executive orders to accommodate California Indians who could be induced to locate there. The dispute appeared to culminate in the decisions in *Short v. United States*,[1] pursuant to which the

1. The *Short* litigation has lasted 38 years and includes seven published opinions. Although petitioned three times to review the *Short* holdings, this Court has refused to do so. *Short v. United States*, 202 Ct. Cl. 870 (commissioner's findings), 486 F.2d 561 (opinion only) (1973), *cert. denied*, 416 U.S. 961 (1974) (*Short I*); *Short v. United States*, 661 F.2d 150 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1034 (1982) (*Short II*); *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984) (*Short III*); *Short v. United States*, 12 Cl. Ct. 36 (1987) (*Short IV*); *Short v. United States*, 25 Cl. Ct. 722 (1992) (*Short V*); *Short v. United States*, 28 Fed. Cl. 590 (1993) (*Short VI*); *Short v. United States*, 50 F.3d 994 (Fed. Cir. 1995) (*Short VII*).

United States paid qualified individual Indians of the Reservation over $65 million. The linchpin of the government's liability in *Short* was that "[n]o vested Indian rights in the Square existed." *Short I*, 202 Ct. Cl. at 884. To satisfy the *Short* judgment and settle other claims arising from the same dispute, Congress enacted the Hoopa-Yurok Settlement Act of 1988, App. at 66a, which, inter alia, partitioned the Joint Reservation into the Hoopa Valley and Yurok Reservations, *id.* at 68a-69a, 25 U.S.C. § 1300i-1(a), (b), (c); recognized a vested interest of the Hoopa Valley and Yurok Tribes in their respective partitioned reservations,[2] *id.*; and provided $5 million for purchasing additional lands for the Yurok Tribe. *Id.* at 70a, 25 U.S.C. § 1300i-1(c)(3).

Plaintiffs below and petitioners herein are the Yurok Tribe, the Karuk Tribe of California, and individual *Short* plaintiffs and their descendants, who seek now to rewrite the entire dispute in their Fifth Amendment challenge to Congress' partition of the Joint Reservation. Contrary to this Court's precedent and the reason for the *Short* damages award, petitioners now assert compensable interests in the former Joint Reservation. The Honorable Lawrence Margolis, who has presided over the *Short* litigation since 1983, issued the opinion below. App. at 38a-56a. The Court of Appeals for the Federal Circuit affirmed, noting this litigation is "the latest attempt by plaintiffs to receive a share of the revenues." App. at 8a.

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2. The Hoopa Valley Tribe was permitted to intervene as a defendant because the litigation might impair the Tribe's right to exclude others from its 1988 reservation. *Karuk Tribe of California v. United States*, 28 Fed. Cl. 694, 697 (1993).

REASONS FOR DENYING THE WRIT

This case presents a straightforward question of construction of a statute that pertains to a single reservation in California.[3] It does not involve any novel or undecided legal questions. The lower courts' decisions do not distort this Court's jurisprudence, affect the property rights of "reservation Indians throughout the United States," or conflict with modern concepts of property. *Cf.* Pet. at 11. Rather, the court of appeals' affirmance correctly resolves a dispute specific to the former Joint Reservation and a dispute over the application of settled law to a particular tract of land.

The decisions of the courts below do not conflict with any decision of another court of appeals. Indeed, petitioners do not, and cannot, contend that the decisions of the courts below conflict with decisions of this Court. The courts below correctly applied the principles articulated in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), and *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). Petitioners quarrel with this Court's conclusions in these cases and seek to establish a lesser standard for creation of compensable interests in the public lands of the United States. However, this Court's reasoning in *Tee-Hit-Ton* and *Hynes* is as vital today as when those cases were decided and should not be replaced by petitioners' unilateral expectation of a permanent interest in the former Joint Reservation. Accordingly, the petition for a writ of certiorari should be denied.

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3. While the statute at issue once applied to four reservations, its applicability has been superseded by subsequent enactments. *See* note 10 and accompanying text *infra*.

I. READING THE PLAIN LANGUAGE OF THE 1864 ACT AS CONFERRING NO COMPENSABLE EXPECTANCY ACCORDS WITH WELL-SETTLED PRECEDENT AND PRESENTS NO NOVEL OR UNDECIDED LEGAL QUESTIONS

The issue presented is a simple one of statutory construction: Did Congress, in the 1864 Act, authorize disposition of a compensable interest in public lands of the United State when it also delegated ongoing authority to the President to locate, expand or eliminate the reservations and place as many Indians on the reservations as he could induce to move there? Settled precedent of this Court and other courts who have construed the 1864 Act holds that it did not.

As this Court teaches, it is the language of the treaty or statute that defines the nature of the rights conferred: "When a reservation is established by a treaty ratified by the Senate or a statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action." *Hynes*, 337 U.S. at 103.

Under article IV, and the precedent applying it, it is the language of the instrument, not the form of the instrument, that determines whether Congress creates a compensable interest. This analysis necessarily proceeds on a case-by-case basis, not a categorical one. Using this analytical framework, the courts have held that some executive orders confer a compensable interest in lands,[4]

4. *E.g.*, *Quinaielt Tribe v. United States*, 102 Ct. Cl. 823, 835 (1945) (holding treaty beneficiaries entitled to compensation for a taking where executive order mistakenly located lands, which by

(Cont'd)

and others do not.[5] Similarly, some treaties will be held to convey a compensable interest in lands,[6] and others will not.[7] Petitioners make sweeping arguments concerning broad categories of executive orders and ignore that the courts below construed a single act of Congress. It is simply not the law that the compensability of an Indian reservation turns on whether its boundaries are "fully defined by statute or treaty. . . ." Pet. at 11-12.

Applying these principles, the courts and Congress have consistently construed the 1864 Act as not creating

(Cont'd)
treaty were to be set aside for tribes' exclusive use). *See also Hagen v. Utah*, 510 U.S. 399, 114 S. Ct. 958, 961 & 978 n.13 (1994) (after executive order, Congress confirmed that the lands were "set apart for the permanent settlement and exclusive occupation of such of the different tribes of said territory as may be induced to inhabit the same," which Justice Blackmun contrasted with different treatment of Uncompaghre Reservation, where Indians had "no title to the lands they occupy").

5. *E.g.*, *Sioux Tribe v. United States*, 316 U.S. 317, 331 (1942) (concluding that, where there was no express statutory authorization for conveyance of a compensable interest in public lands, no compensation was required when lands withdrawn by executive orders were returned to the public domain); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947) (same).

6. *E.g.*, *Shoshone Tribe v. United States*, 299 U.S. 476, 496-97 (1937) (concluding that, where United States divested tribe of lands that treaty set aside for their "absolute and undisturbed use and occupation," tribe was entitled to just compensation).

7. *E.g.*, *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 348 (1945) (concluding that treaty merely defining area was insufficient to confer a compensable interest).

compensable rights. *E.g.*, *Pechanga Band of Mission Indians v. Kacor Realty, Inc.*, 680 F.2d 71, 72-73 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Short I*, 202 Ct. Cl. at 878-84, 486 F.2d at 564. *See also Mattz v. Arnett*, 412 U.S. 481, 494 n.15 (1973); *Donnelly v. United States*, 228 U.S. 243, 256-57 (1913).

In *Short I*, the Court of Claims determined that, precisely because no vested rights existed in the Square, qualified *Short* plaintiffs (who appear here as *Ammon* petitioners) could share in and dilute the benefits of other Indians of the Square:

> Given such a statutory scheme, faithfully reflected by the omission of reference to any Indian tribe in the notices of 1864-65 and the executive order of 1876, the Hoopa Indians could get no vested or preferential rights to the Square from the fact alone of being the first or among the first to occupy the Square with Presidential authority. . . . Any exercise of the President's discretion in favor of the Hoopas, in approving their residence on the reservation, gave the Hoopas no vested rights as against such other tribe as might be the beneficiary of a simultaneous or subsequent exercise of the President's discretion.

Short I, 202 Ct. Cl. at 878 (citations omitted). Based on this interpretation of the Act, the *Short I* court concluded that "[n]o vested Indian rights in the Square existed." *Id.* at 884. That holding,[8] coupled with the United States' funding

8. In their footnote 9, petitioners grossly mischaracterize the *Short* holding. *Short* held that Indians of the former Joint Reservation enjoyed the right to share in per capita payments of timber revenues, (Cont'd)

distribution practices, led to payment of millions of dollars in damages to plaintiffs, *Short VII*, 50 F.3d 994 (Fed. Cir. 1995), as well as additional millions pursuant to the Settlement Act. *See Heller, Ehrman, White & McAuliffe v. Babbitt*, 992 F.2d 360, 362 (D.C. Cir. 1993); Resp. App. at 31a-40a. The Settlement Act is premised upon this *Short* holding,[9] upon which Congress expressly relied to find that

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(Cont'd)
pursuant to 25 U.S.C. § 407. *Short* did not hold that any Indians of the Reservation held a compensable interest in the "Hoopa Valley Reservation's resources." *Compare Short II*, 661 F.2d at 152 (clarifying that *Short* plaintiffs entitled to share in only revenues that were distributed to individual Indians) *and Short IV*, 12 Cl. Ct. at 40-42 *with* Pet. at 16 (citing *Short VII*, 50 F.3d 994 (Fed. Cir. 1995)). Similarly, there is no evidence in the record that the partition gave a more valuable interest to one group of Indians over the other, *cf.* Pet. at 7-8, and the Act's legislative history discounts this assertion. S. Rep. No. 564, 100th Cong., 2d Sess. at 14-15, Resp. App. at 23a-24a. (The Senate Report is set forth as respondent Hoopa Valley Tribe's Appendix.)

9. Petitioners' characterization of the Hoopa Valley Tribe's response to the *Short* litigation is also inaccurate. *See* Pet. at 7. The Settlement Act expressly preserves the *Short* holding and provides for settlement payments to all qualified Indians of the Joint Reservation:

> Nothing in this subchapter shall affect, in any manner, the entitlement established under decisions under the United States Court of Federal Claims in the *Short* cases or any final judgment which may be rendered in those cases.

App. at 71a-72a, 25 U.S.C. § 1300i-2; Resp. App. at 30a-31a. *See Short VI*, 28 Fed. Cl. at 595 (construing § 1300i-2 and concluding that the Act changes the Government's discretion to make payments).

"[no] tribe has any vested right to the benefits [sic] the Hoopa Valley Reservation. . . . . [I]t is clear that no tribal vested rights, as against the plenary power of Congress to deal with the property, have arisen." Resp. App. at 19a-20a; H. Rep. No. 938, 100th Cong., 2d Sess. at 18 (1988).

As other courts have, the courts below searched in vain for any language in the 1864 Act evincing Congress' intention to confer permanent property interests on the Indians located to the 1864 Act reservations. As in *Short*, they found none. *Compare Short I*, 202 Ct. Cl. at 974 (findings 175, 176) *with* App. at 45a (1864 Act "devoid of express language vesting permanent ownership rights") *and id.* at 14a ("Nothing in the language of the 1864 Act demonstrates a 'definite intention by congressional action,' to create a vested interest in the Indians who would reside on the reservations created under the Act.").

In this case, Judge Margolis noted that for plaintiffs to invoke the Fifth Amendment, they had to establish an "historically rooted expectation" of compensability in the property alleged to have been taken. App. at 42a-43a (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992); *California Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992)). Judge Margolis looked to this Court's precedent to provide the governing principles to determine whether plaintiffs indeed possessed recognized title, or in other words, an "historically rooted expectation of compensability" necessary to prevail on their Fifth Amendment claims. *E.g.*, *United States v. Jim*, 409 U.S. 80, 82-83 (1972) (individuals do not have property interest in tribal resources); *Sioux Tribe v. United States*, 316 U.S. 317, 325-26 (1942); *Hynes*, 337 U.S. at 104; *Confederated Bands of Ute Indians*

v. United States, 330 U.S. 169, 176, 177-78 (1947); *Tee-Hit-Ton*, 348 U.S. at 278-79; *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 687 (9th Cir. 1976), *cited in* App. at 42a-43a. In accordance with previous decisions concluding that the 1864 Act did not confer such an interest on Indians of this Reservation, Judge Margolis concluded that plaintiffs did not.

Petitioners' contention that the lower courts' decisions are out of step with modern precedent is baseless. Judge Margolis synthesized this Court's "modern" takings decisions with this Court's decisions relating to compensability of Indian property in general and the 1864 Act specifically:

> Until title is "recognized," it cannot be said that a plaintiff has the historically rooted expectation of compensability necessary to recover in an action for just compensation.

App. at 43a; *see also id.* at 13a.

The decisions of the courts below, as well as the other precedent construing the 1864 Act, find that the broad and continuing discretion Congress conferred upon the President confirms that Congress intended to confer no compensable interest in 1864 Act reservations. *E.g.*, *Donnelly*, 228 U.S. at 257 (noting congressional ratification of discretionary actions of successive Presidents under 1864 Act to alter reservation boundaries, restore reservations to the public domain, and abolish reservations and create others in their stead); *Short I*, 202 Ct. Cl. at 877-78 (noting President's continuing discretion under 1864 Act). Indeed, petitioners admit that the 1864 Act conferred discretion on the President to alter the boundaries of the 1864 Act reservations, Pet. at 6,

although they misstate the purpose of the Act. Congress could have delegated authority to the President to "fully define" the 1864 Act reservation boundaries as it did elsewhere in California,[10] but, without some indication of Congress' intention to confer permanent rights, that definition alone would have been insufficient to confer a compensable expectancy on the Indians who settled there. U.S. Const. art. IV, § 3; *see also Hynes*, 337 U.S. at 103-04; *Tee-Hit-Ton*, 348 U.S. at 278-79.

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10. *See, e.g., Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 768 (1984) (Mission Indian Relief Act "permanently established" the six Indian reservations at issue there); *Russ v. Wilkins*, 410 F. Supp. 579, 580 (N.D. Cal. 1976) (concluding that the Act of March 3, 1873, changed the Round Valley Reservation), *rev'd in part*, 624 F.2d 914 (9th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981).

Congress provided funds to purchase land for landless Indians in California. Act of March 3, 1893, 27 Stat. 612, 628 (Interior appropriations act); Act of February 11, 1903, 32 Stat. 822 (providing for section 16 lands for Mission reservation); Act of June 21, 1906, 34 Stat. 325, 333 (authorizing $100,000 for land purchases and water development for landless California Indians); Act of March 1, 1907, 34 Stat. 1015, 1022 (Interior appropriations act); Act of April 8, 1908, 35 Stat. 70, 76 (appropriating $50,000 for additional land purchases for landless California Indians); Act of August 1, 1914, 38 Stat. 582-89 (same, $10,000); Act of May 10, 1926, 44 Stat. 461 (Interior appropriations bill); Act of February 14, 1931, 46 Stat. 1121 (same); Act of August 9, 1937, 50 Stat. 564, 573 (same, reappropriating $5,004.25). These lands became known as "rancherias."

Lands for rancherias were also acquired under section 5 of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984. *E.g.*, Act of June 22, 1936, 49 Stat. 1765-66 (appropriating $1,000,000 and authorizing expenditure of another million dollars to be allocated in a future appropriation).

Petitioners' purported analogy between the 1864 Act and the treaties involved in *United States v. Klamath & Moadoc Tribes of Indians*, 304 U.S. 119 (1938), and *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), has been previously argued and rejected. The wording of the treaties in those cases, which was the product of bargaining between the treaty parties, is completely unlike Congress' language in the 1864 Act. California Indians had no role in the framing of the 1864 Act; indeed, the Act represented a change of direction, rejecting permanency wording proposed in a predecessor bill, App. at 48a-49a, and the 1851 treaties with California tribes, which were refused ratification by the Senate. *See Indians of California v. United States*, 98 Ct. Cl. 583, 589 (1942), *cert. denied*, 319 U.S. 764 (1943).

The courts below properly rejected petitioners' contention that the purpose of the 1864 Act was to provide California Indians with permanent reservations. *Cf.* Pet. at 5. Petitioners assert that the insurgence of white settlers in the area made it "imperative that, in lieu of treaties, another way be found to provide the California Indians with permanent reservations" and that Congress did so in the 1864 Act. Pet. at 5. However, this "imperative" is reflected neither in the language of the 1864 Act nor the jurisprudence construing it. Nor is it reflected in the Senate's refusal to ratify the 1851 treaties with the California Indians. Many California tribes ultimately obtained permanent reservations but they did so under other authorities, not the 1864 Act. *See* note 10, *supra*.

Petitioners' quotations from *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937), *subsequent opinion at* 304 U.S. 111 (1938), are also inapposite. The treaty that the Shoshone Tribe signed provided that the territory at issue

there was "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians." 299 U.S. at 485. If the Indians of the former Joint Reservation had been granted "absolute and undisturbed use and occupation," such a right would have precluded the President from "chang[ing] [1864] reservation sites almost at will." *Pechanga Band*, 680 F.2d at 72.

Petitioners' theory was propounded in the *Short* litigation and expressly rejected by that court. The Solicitor of the Department of Interior cited *Shoshone Tribe v. United States*, 299 U.S. 476 (1937), and *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938), as well as other cases cited by petitioners, to conclude that permitting Indians of the Addition to share the proceeds of the resources of the Hoopa Valley Tribe would be an unconstitutional taking of Hoopa rights that vested in 1864. "Rights of Indians in the Hoopa Valley Reservation, California," 65 I.D. 59, 2 Op. Sol. Int. 1814, 1817 (1958). However, *Short* rejected the Solicitor's conclusion as having "neither tangible support nor rational theoretical basis" in light of the fact that "no vested Indian rights in the Square existed." *Short I*, 489 F.2d at 568, 202 Ct. Cl. at 884.

Petitioners incorrectly seek to rewrite the plain language of the 1864 Act through application of a canon of construction and the "underlying trust relationship between the United States and Native American peoples." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S. Ct. 789, 800-01 (1998) ("The principle according to which ambiguities are resolved to the benefit of Indian tribes is not, however, 'a license to disregard clear expressions of tribal and congressional intent' " quoting *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975)).

Cf. Pet. at 19. Moreover, this canon does not apply where tribes are on both sides of the conflict. *See Northern Cheyenne v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) (canon of liberal construction has no application where contesting parties is an Indian tribe and individuals consisting primarily of tribal members).

Just as the canon of construction cannot rewrite plain statutory language, the United States' trust responsibility to Indians cannot be used to manufacture a conveyance of an interest in public lands where Congress's language shows no intent to do so. *See Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (concluding that trust responsibility did not limit Secretary's discretion to reorder Indian Health Service program priorities to serve a broader beneficiary group). The trust responsibility is necessarily constrained by article IV. The cases cited by petitioners do not hold differently. *E.g.*, *United States v. Shoshone Tribe*, 304 U.S. at 117. As this Court stated when confronted with a similar argument, "We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity . . . is for the Congress." *Northwestern Shoshone Indians*, 324 U.S. at 353.

II. THE DETERMINATION THAT NO CONGRESSIONAL OR EXECUTIVE ACTION AFTER 1864 CREATED A COMPENSABLE EXPECTANCY ACCORDS WITH SETTLED PRECEDENT AND DECIDES NO NOVEL QUESTIONS.

In 1942, this Court stated that the General Allotment Act, codified at 25 U.S.C. §§ 331-354, "did not amount to a recognition of tribal ownership of the lands prior to allotment." *Sioux Tribe v. United States*, 316 U.S. 317,

325-26 (1942).[11] Petitioners' assertion that the 1887 Act is a general congressional recognition of a compensable interest in all executive order reservations flatly contradicts *Sioux Tribe*.

The courts below correctly rejected petitioners' similar arguments based on the 1927 Mineral Act, 44 Stat. 1347, *codified at* 25 U.S.C. §§ 398a-398c. The plain language of the 1927 Act undercuts petitioners' argument. Although the 1927 Act eliminated the President's ability to alter the size of executive order reservations, it expressly preserved Congress' ability to do so. *See* 25 U.S.C. § 398d. Petitioners also ignore that the 1927 Act would not limit the President's discretion to infinitely dilute the rights of Indians on the former Joint Reservation by continuing to accommodate additional Indians there. Until passage of the Settlement Act in 1988, any rights of the Indians residing there could have been diluted out of existence without compensation.

Petitioners do not address the incongruity of their argument. Why would Congress reserve to itself a right in the 1927 Act that could be exercised only by paying compensation? Moreover, if petitioners were correct that the 1927 Act generally recognizes compensable interests in executive order reservations, *see* Pet. at 15, the outcomes in numerous decisions would be wrong. *E.g.*, *Sekaquaptewa v. McDonald*, 448 F. Supp. 1183, 1192 (D. Ariz. 1978) (specifically rejecting 1927 Act theory), *aff'd in relevant part*, 619 F.2d 801 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980); *see also Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949).

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11. Neither the Settlement Act nor the holding of the courts below has any effect on individualized property or lands owned by individuals; the legal effect reaches only "unallotted" lands. *See* App. at 69a, 25 U.S.C. § 1300i-2.

Nor did the Indians of California Act, Act of May 18, 1928, 45 Stat. 602, 25 U.S.C. § 651 *et seq.*, recognize any compensable interest in the former Joint Reservation. The Act recognized an equitable claim and the Indians of California were paid to settle a claim brought pursuant to the 1928 Act. *See Indians of California v. United States*, 102 Ct. Cl. 837 (1944); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 566 (1962) (noting the 1928 Act as one by which Congress conferred jurisdiction on the court of claims for breach of "at most a moral obligation").

The lower courts' rejection of post-1864 actions by the Executive as conferring any compensable interest in petitioners follows established precedent. Because article IV confers exclusive authority on Congress to dispose of public lands, actions of the Executive branch do not equate to congressional "intent to convey a compensable interest" required by article IV. *Sekaquaptewa*, 448 F. Supp. at 1192. Mere inferences are also insufficient to satisfy article IV. *Cf.* Pet. at 16.

Throughout this litigation, petitioners have reiterated their "settled understanding as to their permanent home," Pet. at 17, and "mutually reinforcing understandings" and "well grounded expectation[s] of ownership," *id.* at 20, in the former Joint Reservation. Congress has generally been alert to prevent creation of reliance rights in public lands. *E.g.*, *Public Lands Council v. Babbitt*, 529 U.S. 728, 120 S. Ct. 1815, 1820 (2000) (Taylor Grazing Act permits "reflected the leasehold nature of grazing privileges; consistent with the fact that Congress had made the Secretary the landlord of the public range and . . . grazing privileges discretionary."). Thus, the courts below correctly recognized that petitioners' unilateral reliance on use of public lands is

insufficient to satisfy the requirements of article IV. U.S. Const. art. IV, § 3; *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). *See also United States v. Title Ins. Co.*, 265 U.S. 472, 486 (1924) (Indian open and continuous occupancy since before Mexican grant failed due to noncompliance with California land claims act of 1851). Neither *Mitchell v. United States*, 463 U.S. 206 (1983), nor *Short III*, 719 F.2d at 1134, are to the contrary.

The Hoopa Valley Tribe agrees with petitioners on one measure: Little about this long, convoluted and tortured dispute regarding the Joint Reservation feels just to the Indians involved. *See* Pet. at 21. In 1974, the *Short* court told the Hoopa Valley Tribe that the homeland they had believed to be exclusively their own since time immemorial was not. This holding was the linchpin on which the Settlement Act as well as the United States' $65 million liability to the *Short* plaintiffs was premised. Now petitioners ask this Court to overturn the *Short* holdings, discard the principles of *Tee-Hit-Ton* and *Hynes*, reverse its holding in *Donnelly*, continue the litigation, and pay them again. That, the Hoopa Tribe submits, is not justice.

CONCLUSION

For the reasons stated above, respondent Hoopa Valley Tribe requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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Dated: February 20, 2001

APPENDIX

APPENDIX — S. REP. 100-564 (1988)

Calendar No. 1025

100th Congress, 2d Session } SENATE { Report 100-564

PARTITIONING CERTAIN RESERVATION LANDS BETWEEN THE HOOPA VALLEY TRIBE AND THE YUROK INDIANS, TO CLARIFY THE USE OF TRIBAL TIMBER PROCEEDS, AND FOR OTHER PURPOSES

September 30 (legislative day, September 26), 1988. — Ordered to be printed

Mr. Inouye, from the Select Committee on Indian Affairs, submitting the following

REPORT

[To accompany S. 2723]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2723) to partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is an amendment in the nature of a substitute.

PURPOSE

S. 2723, introduced by Senator Cranston on August 10, 1988, is a bill to partition certain reservation lands between

two tribes in the northern part of the State of California: the Hoopa Valley Indian Tribe and the Yurok Tribe, and to resolve long standing litigation between the United States, the Hoopa Valley Tribe and a large number of individual Indians, most, but not all of whom are of Yurok descent, who have asserted an individual interest in the communal reservation property. The claims were originally asserted in 1963 in the yet to be finalized case of *Short* v. *United States* filed in the United States Court of Claims, and has led to a number of companion or collateral cases which have made it impossible for the Hoopa Valley Tribe to perform normal tribal governmental functions, including the management of a significant portion of the reservation property.

The legislation will partition the reservation into two reservations, one consisting of the Hoopa Valley Square to be set aside for the use and benefit of the Hoopa Valley Tribe, and the other consisting of the Hoopa or Klamath Extension, to be set aside for the use and benefit of the Yurok Tribe. The authority of the Hoopa Valley Tribe to govern the Hoopa Valley Square and its interests in the assets of the Square will be confirmed. The Yurok plaintiffs are authorized to organize and adopt a constitution and the property and governmental rights of the Yurok Tribe in the Extension will be confirmed. A communal escrow account which now exceeds $65 million will be allocated between the Hoopa Tribe and the Yurok or "Short" plaintiffs. Limited per capita payments from the accrued escrow account are authorized for each of the tribes. A third portion is used to provide additional payments to persons who do not wish to become members of the newly organized Yurok Tribe. The remaining dollars are then allocated to the Yurok Tribe for governmental or development purposes.

This legislation will remove the legal impediments to the Hoopa Valley Indian Tribe to governance of the Hoopa Square and establish and confirm its property interest in the Square. The legislation will also establish and confirm the property interests of the Yurok Tribe in the Extension, including its

interest in the fishery, and enable the tribe to organize and assume governing authority in the Extension.

This legislation should not be considered in any fashion as a precedent for individualization of tribal communal assets. The solutions fashioned in this legislation spring from a series of judicial decisions that are unique to the Hoopa Valley Indian Reservation that have established certain individual interests that conflict with the general federal policies and laws favoring recognition and protection of tribal property rights and tribal governance of Indian reservations. The intent of this legislation is to bring the Hoopa Valley Tribe and the Yurok Tribe within the mainstream of federal Indian law.

The Yurok Tribe is a federally recognized tribe, but it is not organized and there is no established roll of members. This legislation enables the tribe to organize and to establish its base roll. Persons who are not members of the Hoopa Tribe but who meet certain criteria under the *Short* case are authorized to elect whether or not they wish to become an enrolled member of the Yurok Tribe, with all of the rights and benefits that that entails, including provision of federal services springing from membership in a federally recognized tribe. All minor children meeting the criteria will be deemed to be members of the Yurok Tribe unless they are already enrolled in another federally recognized tribe whose membership criteria forbids dual enrollment in another tribe.

HISTORY

ABORIGINAL TRIBES AND LANDS OF NORTHERN CALIFORNIA

The lands of what is now northern California, like most of the Pacific coastal area, were aboriginally inhabited by many small tribes or bands of Indians of numerous linguistic stocks or derivations. Representatives [sic] tribes in the general area of dispute included the Hoopa (Hupa), Chilula, Whilkut, and

Nongati of Athapascan derivation; the Yurok and Wiyot of Algonkian derivation; the Karok (Karuk), Shasta, and Chimariko of Hokan stock; and the Wintun of the Penutian language.

The original location of these tribes centered upon the drainages of the Klamath and Trinity Rivers and adjacent streams in extreme northwestern California. The Klamath River flows southwesterly out of southern Oregon to its junction with the Trinity River (which flows north and is essentially a branch of the Klamath) and, then, veering sharply to the northwest, continues to the ocean. As noted by the Court of Claims in the *Jessie Short* case, the two rivers form a "Y" whose arms are the Klamath and whose trunk is the Trinity.

The aboriginal lands of the Yurok or Klamath Indians were generally centered on the drainage of the valley of the Klamath River from the Pacific Ocean to its fork with the Trinity River. These lands lay northward from that fork and westward to the Pacific. The lands of the Wiyot, a tribe related to the Yurok, were south of the Yurok lands in a narrow strip along the ocean.

The aboriginal lands of the Hupa or Hoopa Indians were centered on the drainage of the Hoopa Valley of the Trinity River southward from its fork with the Klamath. The lands of the related tribes of the Chilula, Whilkut, and Nongatl lay to the west and south of the Hoopa lands and eastward of the Yurok and Wiyot lands.

The aboriginal lands of the Karok, and the related Shasta and Chimariko tribes, lay to the east of the Hoopa and Yurok lands on the upper drainages of both the Klamath and Trinity Rivers. The Wintun lands were southeast of the Hoopa lands along the upper drainage of the south fork of the Trinity River.

Although some scholars disagree, the U. S. Court of Claims noted in the case of *Jessie Short et al.* v. *The United States* (202 Ct. Cl. 870, 886):

> The Indian tribes of Northern California were not organized or large entities; Indians resident on a

particular river or fork were a "tribe". Tribal names were often applied inexactly and usually meant only a place of residence. To call an Indian a "Hoopa" or a Trinity Indian meant he was an Indian resident in the valley of the Trinity called Hoopa. The names "Yurok" and "Karok" . . . also meant a place of residence.

IMPACT OF WHITE SETTLEMENT

These small Indian tribes or bands had only minimal contact with non-Indians, primarily Spanish settlers to the south or occasional fur-trading or exploration parties, until the discovery of gold in 1849. With that discovery came the well-known influx of gold seekers and other white settlers and immigrants. As the white population grew and white settlements expanded, the conflicts with local Indian tribes and bands increased in number and intensity. White settlers sought to push the Indians off their lands and demanded that local and Federal governments take steps to remove the Indians to other areas. Backed upon the Pacific Ocean, the tribes had no place else to go and the inevitable hostilities and warfare between Indians and whites began to occur.

The huge influx of whites into the area and the resulting wars had a devastating impact upon the Indian tribes. In 1850, only two years after the United States had acquired the territory from Mexico, Federal officials recognized that something had to be done quickly for the tribes. Indian Sub-agent Adam Johnston wrote that the white men had taken Indian lands and resources, introduced strange diseases, and provoked violent confrontations.

In other areas, the government had tried to relocate the Indians before the advance of white settlers; but there were already more than 100,000 whites in California, which became a state on September 9, 1850. It was decided that the best policy was to set aside small tracts of land in the new state for the tribes to protect them from the worst effects of settlement

by separating them from the whites. At the same time, vast tracts of Indian lands would be opened to eager white settlers and miners.

To effectuate this policy, Congress provided for the appointment of treaty commissioners in September of 1850 to secure the cession by the Indians of their lands and to establish reservations for them. By the end of 1851, numerous treaties with many Indian tribes or bands, including those of northern California, had been signed. On June 28, 1852, President Fillmore presented eighteen California treaties to the Senate for ratification. Because of strong white opposition to providing any lands for the Indians, the Senate, in secret session, rejected the treaties on June 28, 1852. With the rejection of these treaties, the conflicts and hostilities between white settlers and Indian tribes resumed.

In northern California, much of the warfare and bloodshed was centered in the valleys of the Klamath and Trinity Rivers which were the traditional homelands of the Yurok and Hoopa Indians and related tribes.

ESTABLISHMENT OF KLAMATH RIVER RESERVATION

In an early attempt to carry out the policy adopted with respect to California Indian tribes, President Pierce, by Executive Order of November 16, 1855, established the Klamath River Reservation for the benefit of Indian tribes in that general area. The President acted pursuant to the Act of March 3, 1853 (10 Stat. 226, 238), as amended in 1855, authorizing the creation of seven military reservations in California or in the Territories of Utah and New Mexico.

As finally established, the Klamath River Reservation was "a strip of territory commencing at the Pacific Ocean and extending 1 mile of width on each side of the Klamath River" for a distance of approximately 20 miles, containing 25,000 acres. The reservation was within the aboriginal territory of

the Yurok and, at the time of its creation, was occupied by about 2,000 Indians of the Yurok tribe, also known as the Klamaths. However, the Hoopa and other inland tribes refused to move onto this reservation and armed conflict in those areas continued.

ESTABLISHMENT OF THE HOOPA VALLEY RESERVATION

In 1864, in a further effort to bring about peace in California, Congress enacted legislation (Act of April 8, 1864, 13 Stat. 39) reorganizing the Indian Department in California by providing for the appointment of one superintendent of Indian Affairs and authorizing the President to establish four reservations in the State. On May 26, 1864, the President appointed Austin Wiley as Superintendent.

On August 12, 1864, at Fort Gaston, Wiley negotiated an agreement with the Hoopa Indians along the Trinity River entitled "Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians." Section 1 of the agreement provided that—

> The United States . . . by these presents doth agree and obligate itself to set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes.

Section 2 provided that the reservation "shall include a sufficient area of mountain on each side of the Trinity river as shall be necessary for hunting grounds, gathering berries, seeds, etc." This agreement or "treaty" was never submitted for

ratification. However, with corrections, it was approved by the Interior Department.

On August 21, 1864, at Fort Gaston, California, Superintendent Wiley issued a proclamation, under the authority of the 1864 Act and instructions from the Interior Department, establishing the Hoopa Valley Reservation on the Trinity River in Klamath County, California. Wiley's proclamation provided that the metes and bounds of the reservations would be established later by order of the Interior Department, subject to the approval of the President.

The Trinity River in the Hoopa Valley flows north through the valley to the junction of the Trinity and Klamath Rivers. Since the reservation was described as extending six miles on each side of the river to the junction of the two rivers, the reservation formed a 12-mile square bisected by the last 12 miles of the Trinity River, and has come to be called the "Square" or the "12-mile Square". As of February 18, 1865, when Wiley defined the boundaries of the Hoopa Valley Reservation, there have been identified, among the various tribes resident there, a substantial number of Indians of the Hoopa Tribe living in several villages in the Hoopa Valley proper, a smaller group of Lower Klamath or Yurok Indians living in a few villages in the northern and northwestern part of the reservation, and a number of Indians of the Redwood or Chilula tribe.

On June 23, 1876, President Grant issued an executive order formally establishing the boundaries of the Hoopa Valley Reservation and provided that the land embraced therein "be, and hereby is, withdrawn from public sale, and set apart in California by act of Congress approved April 8, 1864." As bounded, the reservation was a square, twelve miles on a side, now recognized as encompassing approximately 88,665.52 acres.

The Court of Claims in the *Jessie Short* case found that, at about the time of the 1876 Executive Order, there had been

identified as living within the boundaries of the reservation established the following tribes:

Tribe	1875	1876
Hoopas	571	511
Klamaths (Yuroks)	43	44
Redwoods	46	12
Saias	56	13

CREATION OF THE "ADDITION"

In the late 1880's and early 1890's, the legal validity of the 1855 Klamath River Reservation came under attack. There was growing pressure from surrounding white settlers to open these lands to homesteading. In addition, the Department of the Interior sought to control the activity of non-Indians on the reservation. In 1888, the United States brought suit against a non-Indian trader on the reservation for unauthorized activity. The district court, in an 1888 decision later upheld by the circuit court in 1889, held that the Klamath River Reservation did not have legal status as an Indian reservation. *United States* v. *Forty Eight Pounds of Rising Star Tea etc.*, 35 Fed. 403. The court held that the President's power to establish Indian reservations in California was controlled by the 1864 Act which provided for only four such reservations and that the President had exhausted his power thereunder by establishing four reservations, including the Hoopa Valley Reservation.

In order to protect the Klamath or Yurok Indians residing on the Klamath River Reservation, the Department sought to find a way to preserve reservation status. Since the 1864 Act limited the number of Indian reservations in California to four and since there were already four reservations established pursuant to that Act, the 1855 reservation could not be validated by a further executive order establishing it as a reservation. In

order to get around the limitations of the 1864 Act, the Interior Department used the provisions of the 1864 Act itself.

On October 16, 1891, President Harrison issued an executive order which enlarged the Hoopa Valley Reservation "to include a tract of country 1 mile in width on each side of the Klamath River, and extending . . . to the Pacific Ocean.".[sic] In effect, the order incorporated the questionable 1855 Klamath River Reservation into the Hoopa Valley Reservation by connecting the two reservations with a strip of land one mile on either side of the Klamath River extending 25 miles from the southern boundary of the Klamath River Reservation to the northern boundary of the Hoopa Valley Reservation.

After the addition of lands by the 1891 order, the combined reservation contained about 147,000 acres, 25,000 in the original Klamath River Reservation, 33,168 acres in the "Connecting Strip", and 88,666 acres in the original Hoopa Valley Reservation or "Square".

Even though the 1891 order combined the two reservations, they continued to be treated by the Department and the Indian Service, in some respects, as two reservations, the "Addition" for the Klamath River or Yurok Indians and the "Square" for the Hoopa Indians. In 1892, Congress, by the Act of June 17, 1892 (27 Stat. 52), provided for the allotment of lands on the "Klamath River Indian Reservation" to "any Indians now located upon said reservation" and the sale of the remainder for homestead purposes. In addition, from that date forward until the present, the Department of the Interior continued to administer the combined reservations as if they were still two reservations for certain purposes.

Under this method of administration, the Hupa or Hoopa Tribe was generally recognized as being located on, and owning, the "Square" portion of the reservations. The Indians on the "Square" later formally organized a tribe and tribal government as the Hoopa Valley Tribe. The Department generally recognized the land of the original Klamath River

Reservation and the 1891 "extension" as the reservation of the Yurok tribe. That tribe has never organized.

1891 TO 1955

From 1891 to 1955, the official position of the Department of the Interior and the Bureau of Indian Affairs (Indian Service) regarding the rights of tribes in the Hoopa Valley Reservation varied with the official involved and the issue under consideration.

As noted earlier, for many purposes, the "Square" and the "Addition" were treated as two separate reservations and the Yurok or Klamath Indians and the Hoopa Indians were treated as two separate tribes. Indeed, the allotment of the lands of the reservation to individual Indians and the opening of the remainder to white homesteading under various Acts of Congress dealt with the reservation as three separate tracts: the original Klamath River reservation; the "Connecting Strip"; and the "Square". Yet, official correspondence in certain years relating to the allotment process of the three tracts evidences an understanding that there was only one reservation and that the right of individual Indians to allotments were to be determined from that perspective.

The attitude of Federal officials during this time relating to the existence of tribal status and the early attempts of the Hoopa and Yurok Indians to organize was equally vacillating and confusing. In some respects, these officials encouraged and approved of efforts to organize separate entities and councils representing the two tribes. Yet, conflicting correspondence exists indicating an understanding that these separate organizations could only represent local interests and could not act with respect to the reservation as a whole.

By 1952, however, when the Commissioner of Indian Affairs approved the constitution and bylaws of the Hoopa Valley Tribe, the position of the Department, at least on a de facto basis, was that the "Square" was a reservation for the

Hoopa Valley Tribe and subject to the management of the Hoopa Valley Business Council elected pursuant to that constitution. Under the constitution, the Department recognized the membership of the Hoopa Valley Tribe which did not include most of the Yurok or Klamath Indians.

JESSIE SHORT V. UNITED STATES

This administrative position continued basically unchallenged until 1955, when substantial tribal revenues from the sale of commercial timber from the "Square" began to be realized. Beginning in 1955, the Secretary of the Interior began to credit revenue derived from the "Square" to a trust account separate from revenue earned from other portions of the Hoopa Valley Reservation.

From January of 1955 until February of 1969, the Secretary, upon the request of the Hoopa Valley Business Council, each year disbursed from the Hoopa Valley trust fund per capita payments to the Indians on the official roll of the Hoopa Valley Tribe. The total amount of such funds disbursed per capita was $12,657,666.50. (Subsequently, on 21 separate occasions commencing on April 10, 1969, and ending on March 7, 1980, additional per capita payments amounting to some $16,660,492 were made to individual Hoopa Indians on the official roll of the Hoopa Valley Tribe.)

In 1963, certain Indians [()identified as "Yurok" Indians) claiming descent from Indians allotted on the reservation, but not enrolled as members of the Hoopa Valley Tribe, brought a suit against the United States in the United States Court of Claims in the case of *Jessie Short et al.* v. *U. S.* (Ct. Cl. 102-63) alleging that the government had wrongfully excluded them from sharing in the per capita payments from revenues of the communal lands of the Square made by the Secretary from 1955 onward. In 1972, a Tribal [sic] Commissioner of the Court of Claims sustained the plaintiffs' position. His decision was later upheld on October 17, 1973, by the Court of Claims

(202 Ct. Cl. 870) and the Supreme Court refused to review the decision in 1974.

In construing the various relevant laws and executive orders noted above, the court held that—

(1) the Hoopa Valley Reservation, as established by the Executive Order of June 23, 1876, pursuant to the 1864 Act, and as augmented by the addition of land under the Executive Order of October 16, 1891, was a single Indian reservation;

(2) no Indian tribe as a tribe had, or has, a vested right to the ownership of, the reservation or its resources;

(3) the reservation had been duly set apart for Indian purposes in 1876 to accommodate the Indian tribes of northern California;

(4) the Secretary had wrongfully paid per capita payments only to members of the Hoopa Valley Tribe to the exclusion of the plaintiffs; and

(5) that any Indian who had certain connections to the reservation and who could meet the court's standards for qualification as an "Indian of the Reservation" was entitled to share in the distribution of revenues from the "Square" and, therefore, was entitled to damages against the United States.

The court in the *Short* case is now engaged in determining which of the plaintiffs meet that criteria. Once this process has been completed, the court will enter judgment against the United States on behalf of each individual plaintiff found to meet that criteria.

PUZZ V. UNITED STATES

The decision of the Court of Claims in the *Short* case involved a money damage claim against the United States by individual Indians with respect to their right to share in the revenue derived from the resources of the "Square" upon

individualization by the Secretary. The case did not deal with the issue of where the authority to make management decisions relating to the lands and resources of the "Square" or, for that matter, the reservation as a whole was vested.

In 1980, some of the plaintiffs in the *Short* case filed suit against the United States in the United States District Court for the Northern District of California in the case of *Puzz* v. *U. S.* (No. C 80 2908 TEH). In this case, the plaintiffs challenged the right of the United States to recognize the governing body of the Hoopa Valley Tribe as the sole governing authority of the reservation entitled to manage the reservation resources. On April 8, 1988, the court held that the reservation, as extended, was intended for the communal benefit of northern California Indian tribes and groups and that, absent statutory delegations, existing tribes lacked power to manage the resources. The Court ordered the Bureau of Indian Affairs to assume the management of the reservation and its resources and to consult fairly with all persons having an interest in the reservation on its decisions.

BACKGROUND

NATURE OF U. S.-INDIAN RELATIONSHIP

From the earliest contact with the Indians of this continent, the European powers and the United States have dealt with the Indians on a government-to-government or tribal basis. The historical development of the relationship between the United States and the Indian tribes, whether it is denominated as a trust, guardianship, or government-to-government relationship, has resulted in a political relationship focusing on the Indian tribes, not on individual Indians.

The great mass of treaties, statutes, and executive orders implementing Federal Indian policy are premised upon this tribal, political relationship. To the extent such laws confer special benefits on individual Indians or impose special burdens

or limitations on such Indians or their property, these laws are nevertheless founded upon the status of such Indians as members of Indian tribes enjoying a political relationship with the United States.

The Supreme Court, in upholding the constitutionality of the law extending a preference to Indians for Federal employment in the Bureau of Indian Affairs, held that the law, and the many other Federal laws for the benefit of Indians, were not invidiously discriminatory because the laws were not based upon the racial background of the individual, but upon their status as members of an Indian tribe. *Morton* v. *Mancari*, 417 U.S. 535 (1974). In those limited cases where the Congress has legislated specially with respect to individual Indians outside their relationship as a member of an Indian tribe, other National grounds are, or will be, found.

CREATION OF INDIAN RESERVATIONS

Where the United States has not recognized the title of an Indian tribe to its aboriginal lands, usually through creation of a permanent reservation for such tribe from those aboriginal lands, the tribe does not have a compensable title in such lands and the Congress may take the lands without incurring a liability to the tribe. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

As a consequence of the nature of the relationship between Indian tribes and the United States, Indian reservations were recognized or set aside by treaty, statute, or executive order for Indian tribes, not individual Indians. In most cases, the enabling law specifically denominated the Indian tribes [sic] or tribes for whose benefit the reservation was established.

In certain cases, particularly with respect to reservations established by executive order, the source authority does not designate a particular tribe as the beneficiary of the reservations. In those cases, discretion is left in the responsible executive official to later designate the tribe or tribes to be

settled on such reservation. Until such official has acted under that discretion, no tribe is deemed settle[d] on the reservation. In the December 16, 1882, Executive Order establishing a reservation for the Hopi Tribe, the language set the lands apart for the "Moqui (Hopi) and such other Indians as the Secretary of the Interior may see fit to settle thereon." The Federal court found that the Secretary did not settle the Navajo Tribe on that reservation until long after 1882.

Whether the establishing instrument designates a tribe or tribes as beneficiaries of the reservation or leaves to the discretion of an executive official the authority to later designate beneficiary tribes, in every case, the reservation is set aside for tribal or communal purposes. Individuals have an interest in resources of the reservation only insofar as they are members of the tribal entity for whose benefit the reservation is set aside.

Where the law creating an Indian reservation designates the tribe(s) for whose benefit the reservation is created and where it is clear that the reservation is intended for the permanent benefit of such tribe, the beneficial interest in the reservation becomes vested in that tribe and the power of Congress to deal with the property is limited. Congress, in the exercise of its plenary power over Indian affairs, may modify or take the tribe's property interest in such reservation, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), but, in doing so, will be held to one of two standards.

Congress may act as trustee for the benefit of the Indians and, if it makes a good faith effort to replace the property taken with property of equal or nearly equal value, it will not be held to the 5th Amendment standard. If it take the tribe's property for the United States or for others without making such good faith effort, such action will constitute a 5th Amendment taking. *Shoshone Tribe* v. *U. S.*, 299 U.S. 476 (1937); *Three Tribes of Fort Berthold Reservation* v. *U. S.*, 182 Ct. Cl. 543 (1968); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980).

In other cases, particularly with respect to executive order reservations, the law creating an Indian reservation may not designate the tribe for whose benefit it is intended or, where discretion is left to an executive official to so designate a tribe, that discretionary authority may not have been exercised or exhausted. Or such law may not be clear that the reservation is intended for the permanent benefit of Indians. In those cases, no right, as against the exercise of the plenary power of Congress, has vested in any tribe and Congress may deal with that property as it sees fit without subjecting the United States to a liability for an unconstitutional taking. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949); *Healing* v. *Jones*, 174 F. Supp. 211; 210 F. Supp. 125 (1962), aff'd. 373 U.S. 758; *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 279-80 (1935).

RECOGNITION OF INDIAN TRIBES; TRIBAL MEMBERSHIP

As noted above, the relationship between the United States and Indian tribes is a political one. While the validity of congressional or administrative actions may depend upon the existence of tribes, the courts have made clear that it is up to Congress or the Executive to extend recognition of that status. *Handbook on Federal Indian Law*, 1982, p. 3-5; *U. S.* v. *Rickert*, 188 U.S. 432 (1903). While the power of Congress, in the exercise of its plenary power over Indian affairs under the Commerce clause, to extend political recognition to an Indian tribe is very broad, it cannot be used arbitrarily. In *U. S.* v. *Sandoval*, 231 U.S. 28, 46 (1913), the Supreme Court held:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt

> with as independent tribes requiring the guardianship and protection of the United States are to be determined by the Congress, and not by the courts.

As the power of Congress to extend such recognition is very broad, so also is the power to terminate that recognition. *Menominee Tribe* v. *U.S.*, 391 U.S. 404 (1968).

In general, an Indian tribe has the power to establish its own membership and membership requirements and this right has been consistently recognized by the Congress and the courts. Tribal membership and membership requirements are normally determined by the tribal governing authorities, typically under a tribal constitution or other recognized governing documents.

Nevertheless, Congress retains broad power to determine or modify, for various purposes, a tribe's membership. The United States may assume full control over Indian tribes and determine membership in the tribe for the purpose of adjusting rights in tribal property. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899). Congress may disregard existing tribal membership rolls.

In the case of *Sizemore* v. *Brady*, 235 U.S. 441, 447 (1914), the Supreme Court said:

> Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe, to distribute the lands and funds among them, and to terminate the tribal government.

And it is clear that tribal membership does not confer upon the individual a vested right in tribal or communal property. As stated in *Handbook on Federal Indian Law*, 1982, p. 605-606:

> It is well established that title to the communal land or personal property of a tribe resides in the tribe itself and is not held by tribal members individually. An individual member cannot convey title to any particular tract of tribal land and has no right against the tribe to any specific part of tribal property, absent a federal law or treaty granting vested rights to individual members. . . . A member's right to tribal property is no more than prospective and inchoate unless federal law or tribal law recognizes a more definite right. [Citations omitted.]

STATUS OF HOOPA VALLEY RESERVATION

The decisions of the United States Court of Claims in the case of *Jessie Short et al.* v. *United States* (Ct. Cl. No. 102-63) and related cases, with respect to the interest of individual Indians in the revenues from the Hoopa Valley Reservation, and the decision of the Federal district court in the case of *Puzz* v. *United States*, with respect to the obligation to manage the resources of that reservation, while perhaps correct on the peculiar facts and law, have had a very unhappy result.

It is clear from the 1864 Act authorizing the establishment of Indian reservations in California and the 1876 and 1891 Executive Orders creating the Hoopa Valley Reservation pursuant to such Act that the reservation was created for tribal or communal Indian purposes. This is consistent with the foregoing discussion and with the law of the case in the *Short* case.

Yet, the Court of Claims in the *Short* case very clearly has held that neither the organized Hoopa Valley Tribe, the unorganized Yurok Tribe, nor any other Indian tribe has any vested right to the benefits the Hoopa Valley Reservation. This, too, is consistent with the foregoing discussion. The 1876 Executive Order, creating the Hoopa Valley Reservation, merely provides that it is "set apart for Indian purposes". Since, as

noted, reservations are set aside for Indian tribes, since no tribes were designated in the order, and since the court did not find that the Secretary had definitely used or exhausted his discretion to settle any Indian tribe on the reservation, it is clear that no tribal vested rights, as against the plenary power of Congress to deal with the property, have arisen. This applies not only of Hoopa and Yurok tribal entitlements but also of Karuk claims and claims of groups such as the Tolowa, Wintun and Shasta who are currently seeking federal recognition of tribal status pursuant to 25 C.F.R. Part 83.

The Conclusions of Law by the Federal district court in the *Healing* v. *Jones* case might be instructive. [T]he 1882 Executive Order creating the reservation did designate the Hopi Tribe as a beneficiary, but retained with the Secretary the right "to settle other Indians thereon". In Conclusion of Law No. 2, the court stated:

> By force and effect of the Executive Order of December 16, 1882, . . . the Hopi Indian tribe, on December 16, 1882, for the common use and benefit of the Hopi Indians, acquired the **non-vested** (emphasis added) right to use and occupy the entire reservation . . . subject to the paramount title of the United States, and subject to such diminution in the rights . . . so acquired as might thereafter lawfully result from the exercise of the authority reserved in the Secretary to settle other Indians in the reservation.

It is the Committee's conclusion that, as found by the *Short* case, no constitutionally protected rights have vested in any Indian tribe in and to the communal lands and other resources of the Hoopa Valley Reservation. In carrying out the trust responsibility of the United States under Congress' plenary power, the Committee finds that H.R. 4469, as reported, is a reasonable and equitable method of resolving the confusion and uncertainty now existing on the Hoopa Valley Reservation.

While the court in the *Short* case has found that no tribe have [sic] a vested right in the reservation, it was equally clear on the point that none of the plaintiffs nor any other individual has a vested right in the property. Again, this holding of the court is consistent with the discussion above on the rights of tribal members in tribal property. Two cites from the Federal courts' several decisions in this case may be helpful. In a 1983 decision of the Circuit Court in this case, the court said:

> At the close of our opinion we again stress—what the Court of Claims several times emphasized and we have interlaced supra—that *all* we are deciding are the standards to be applied in determining those plaintiffs who should share as individuals in the monies from the . . . Reservation unlawful withheld by the United States. . . . This is solely a suit against the United States for monies, and everything we decide is in that connection alone; neither the Claims Court nor this court is issuing a general declaratory judgment. We are not deciding standards for membership in any tribe, band, or Indian group, nor are we ruling that Hoopa membership standards should or must control membership in a Yurok tribe or any other entity that may be organized on the Reservation.

In its March 17, 1987, decision, the court said:

> . . . an individual Indian's rights in tribal or unallotted property arise only upon individualization; individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common.

Again, the Committee agrees with the court in the *Short* case that neither the plaintiffs nor any other individuals have a vested right in the Hoopa Valley Reservation as against the right of Congress to make further disposition of that property. As noted above, Congress has power to make determinations about tribal

membership with respect to the adjustment of participation in tribal property. The power is even more clear in this case, where, except for the Hoopa Valley Tribe, there is no organized tribe which has a definable membership.

The Committee is also aware that although Congress later authorized the establishment of additional reservations in California, the Act of April 8, 1864 authorized the establishment of four reservations, including Hoopa Valley, Round Valley, Tule River and Mission. As noted above, in the *Puzz* case, a federal district court construed the Act as requiring that the Bureau of Indian Affairs run the Hoopa Valley Reservation for the benefit of all individuals (including non-tribal members) who had ancestral connections with the Reservation, and also construed the Act as prohibiting the exercise of reserved tribal sovereign powers by Indian tribal governments, with respect to the Hoopa Valley Reservation. The Committee believes that the *Puzz* case is confined to the peculiar facts and law applicable to the Hoopa Valley Reservation, and it is the purpose of S. 2723 to reject the application of this view of the 1864 Act to any California reservation. S. 2723 should therefore help ease the concerns of other tribal councils whose reservation lands are affected in whole or in part by the 1864 Act or similar legislation. It is not true, as a general rule, that federally recognized tribal governing bodies on reservations set apart for more than one historical tribal group need federal authority conferred upon them in order to exercise territorial management powers. Application of such a rule would seriously interfere with tribal sovereignty and modern federal Indian policy.

SETTLEMENT PROVISIONS

S. 2723, as reported by the Committee, is a fair and equitable settlement of the dispute relating to the ownership and management of the Hoopa Valley Reservation. The Section-by-Section Analysis and Explanation which follows sets out in detail the provisions of the bill.

The bill provides for the partition of the joint reservation between the Hoopa Valley Tribe and the Yurok Tribe. As noted, the Committee has concluded that there are no tribal or individual vested rights in the reservation and that Congress has full power to dispose of the reservation as proposed. As a consequence, the Committee need not overly concern itself with precise comparable values in such partition. The Committee intends to deal fairly with all the interests in the reservation, and believes it has done so. The nature of the interests involved here, however, is such that Congress need not precisely determine, or provide, the full value that a fee simple interest in these lands and resources might have.

It is alleged that the "Square", to be partitioned to the Hoopa Valley Tribe, is much more valuable than the "Addition" which is to go to the Yurok Tribe. Tribal revenue from the "Square" is in excess of $1,000,000 annually. Tribal revenue derived from the "Addition" recently has totalled only about $175,000 annually. However, the record shows that individual Indian earnings derived from the tribal commercial fishing right appurtenant to the "Addition" is also in excess of $1,000,000 a year. The Committee also notes that because of the cooperative efforts of the Hoopa Valley Tribe and other management agencies to improve the Klamath River system, and because of the Fisheries Harvest Allocation Agreement apportioning an increased share of the allowable harvest to the Indian fishery, the tribal revenue potential from the "Addition" is substantial. While in recent years tribal income from the "Square" has exceeded tribal income from the "Addition," it is the judgment of the Committee that a functioning tribal government fulfilling the Congress' and the Executive's policy of self-determination merits a certain financial deference over a group of Indians which has previously elected not to have a functioning tribal government. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, codified at 25 U.S.C. §§ 450, et seq.; President's statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983);

S. Con. Res. 76, ordered reported, Senate Indian Committee, 100th Cong., 2nd Sess. (1988). Furthermore, the Committee is acting out of concern that the Hoopas have tended to live on the reservation and that their government be accorded sufficient resources to provide the services necessary to sustain their habitation. Indeed the majority of the Indians living on the combined reservation live on the "Square." The record shows that the Hoopa Valley Business Council is the only full-service local governmental organization on the combined reservation, and has been the major government service provider in the extremely isolated eastern half of Humboldt County. The Hoopa Valley Tribe was recognized by the Congress as warranting federal assistance and support for its self-governance efforts. Conf. Rep. No. 498, 100th Cong., 1st Sess. 889.

As noted elsewhere in this report, the proposed partition is also consistent with the aboriginal territory of the two named tribes involved, particularly since the Hoopa Valley Tribe formally organized in a way encompassing all Indian allotted land on the Square.

The bill also provides for certain settlement options to be made available to individual Indians who can meet the requirement of the court for qualification as an "Indian of the Reservation". With the exception of a limited option to become a member of the existing Hoopa Valley Tribe, the settlement options are either to become a member of the Yurok Tribe or to elect a buy-out option. The settlement terms are to be supported primarily through the use of funds earned from the reservation and maintained by the Secretary in escrow accounts.

The Committee wishes to make very clear that this offer of options by way of settlement of this problem in no way is to be construed as any recognition of individual rights in and to the reservation or the funds in escrow.

LEGISLATIVE HISTORY

On April 26, 1988, Congressman Bosco introduced H.R. 4469 to partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber lands, and for other purposes. The bill is co-sponsored by Representatives Coelho and Miller of California. The intent of the legislation is to resolve a long-standing controversy between the Hoopa Valley Tribe which is organized under constitutional provisions approved by the Secretary of the Interior and persons who are primarily, but not exclusively, of Yurok Indian descent.

On August 10, 1988, the House Committee on Interior and Insular Affairs adopted an amendment in the nature of a substitute and ordered H.R. 4469 reported. The bill is scheduled for a further hearing before the House Judiciary Committee on Friday, September 30, 1988.

On June 30, 1988, Chairman Inouye held an oversight hearing in Sacramento, California, to receive testimony on the general background of the problems and issues on the Hoopa Valley Reservation. This hearing was not directed to specific legislation, but was only for purpose of collecting background information.

On August 10, 1988, Senator Cranston introduced S. 2723, which is identical to H.R. 4469 as ordered reported. The Select Committee held hearings on this bill on September 14, 1988. On September 29, 1988, the Select Committee in open business session, adopted an amendment in the nature of a substitute, and ordered the bill reported with a recommendation that the bill, as amended, be passed.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on September 29, 1988, by unanimous vote of a quorum

present, adopted an amendment in the nature of a substitute and ordered the bill reported with a recommendation that S. 2723, as amended, be passed by the Senate.

SECTION-BY-SECTION ANALYSIS

There follows a section-by-section analysis of S. 2723 a[s] reported and, where appropriate or necessary, a further explanation of the provisions of the bill.

SECTION 1 - SHORT TITLE AND DEFINITIONS

Subsection (a) provides that the Act may be cited as the "Hoopa-Yurok Settlement Act".

Subsection (b) contains definitions of various terms used in the bill.

Among the more important definitions is the definition of "Escrow funds", which lists the accounts maintained by the Secretary of the Interior into which income from reservation economic activity (as opposed to individual trust monies) are deposited; "Indian of the Reservation", which is a term of art developed in the *Short* case to define those persons entitled under *Short* and companion cases as eligible plaintiffs in the claims against the United States arising from the distribution of income from reservation wide economic activities; and definition of "Short cases" to include all companion cases filed thus far.

SECTION 2 - RESERVATIONS; PARTITION AND ADDITIONS

Subsection (a), paragraph (1), provides that, when the Hoopa Valley Tribe adopts a resolution waiving certain claims and granting consent as provided in paragraph (2), the Hoopa Valley Reservation as now constituted and as defined by the Federal Court in the *Short* case, shall be partitioned as provided

in subsection (b) and (c). A technical amendment is added to make clear that the partition is linked to recognition and confirmation of the governing documents of the Hoopa Valley Tribe, as provided in Section 8.

Paragraph (2) provides that the partition of the reservation as provided in paragraph (1) shall not be effective unless the Hoopa Valley Tribe adopts a tribal resolution within 60 days of enactment waiving any claim they may have against the United States arising out of the provisions of the Act. The Secretary is required to publish the resolution in the Federal Register.

An amendment is added to make clear the consent of the Hoopa Valley Tribe to the contribution of the escrow funds to the Settlement Fund. This amendment was requested by the Justice Department. The Committee does not intend that the requirement for a Hoopa tribal waiver under this section or the Yurok tribal waiver requirement under section 9(d)(2) shall constitute a congressional recognition that such tribes or any other Indian tribe may have vested rights in the lands and resources of the joint reservation. In *Hynes* v. *Grimes Packing Co.*[,] 337 U.S. 86, 103 (1949), the Supreme Court held that an executive order reservation "conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President."

Subsequent cases establish that the compensable right of a tribe in an executive order reservation depends upon its status as a confirmed or unconfirmed reservation. The exact legal status of the reservation is unclear from the various Federal court decisions relating to it. However, the decision[s] of the Court of Claims in the *Short* case and the District Court in the *Puzz* case make clear that no existing Indian tribe as a tribe, including the Hoopa and Yurok tribes, have a vested right in the assets and resources of the Hoopa Valley Reservation as now constituted.

The Committee also does not intend that the waivers of the tribes, if given, shall present [sic] the tribes from enforcing rights or obligations created by this Act.

Subsection (b) provides that, effective with the partition as provided in subsection (a), that portion of the reservation known as the "Square" shall be recognized as the Hoopa Valley Reservation and shall be a reservation for the Hoopa Valley Tribe. The Committee notes that, while the record before the Committee and the findings of the court in the *Short* cases show that the "Square" included aboriginal lands of the Yurok or Klamath Indians, most of the lands of the "Square" were within the aboriginal territory of the Hoopa and related bands and villages. This partition also conforms generally with the geography of the reservation which, as currently constituted, comprises two river drainages.

Subsection (c), paragraph (1), provides that, effective with the partition as provided in subsection (a), that portion of the reservation known as the "extension", excluding the lands of the Resighini Rancheria, shall be recognized as the Yurok Reservation and shall be a reservation for the Yurok Tribe. The Committee again notes that the lands comprising the new Yurok reservation were within the aboriginal lands of the Yurok or Klamath bands or villages. Karuk tribal aboriginal lands generally lay upstream of Yurok lands along the Klamath River, outside of the Yurok and Hoopa Valley Reservations.

Paragraph (2) provides that, subject to all valid existing rights, all national forest lands in the Yurok Reservation and about 14 acres of the Yurok Experimental Forest shall be transferred to the Yurok Tribe in trust. These lands contain buildings which will be immediately utilized by the Yurok Tribe. The Committee, therefore, expects the Secretary of the Interior to work with the Yurok Interim Council to ensure that these facilities are cleaned and renovated as soon as possible. This clean-up and renovation should be accomplished under the BIA's existing facilities maintenance and repair budget. In addition, the Secretary shall within six months report to

Congress concerning the advantages, disadvantages, and procedural aspects of conveying to the Yurok Tribe all National Park System lands within the Yurok Reservation. If the Secretary does not recommend immediate conveyance of such lands, his recommendation shall include a proposed intergovernmental agreement which, pending any conveyance, will assure Yurok tribal hunting, fishing, and gathering rights, and reasonable ceremonial and religious access and use on such lands within the reservation.

Paragraph (3) provides that the existing authority of the Secretary to acquire lands for Indians and Indian tribes under the Indian Reorganization Act of 1934 shall be applicable to the Yurok Tribe. $5,000,000 is authorized to be appropriated and is directed to be used for land acquisition for the Yurok Tribe with the limitation that such funds can be used to acquire land outside the reservation only for purposes of exchange for lands inside. An amendment is added to permit acquisition of lands adjacent to and contiguous with the Yurok reservation. The Committee expects that the Secretary will make use of this and other authority to, among other things, insure that Indian lands within the reservation are not, or do not become, landlocked. The Committee is aware that the acquisition of new lands will increase the costs of land and resource management. The Committee, therefore, directs the Secretary to consider these additional costs when preparing the future budgets of the Yurok Tribe.

Paragraph (4) provides that (1) the transfer of funds to the Yurok Tribe under section 4 and 7; (2) the land transfer under subsection 2(c)(2); (3) the land acquisition authority of section 2(c)(3); and (4) the organizational authorities for the Yurok Tribe under section 9 shall not be effective unless the Interim Council of the Yurok Tribe adopts a resolution waiving any claims it might have against the United States under this Act and granting consent as provided in section 9(d)(2). Section 9 of the bill provides for an Interim Council to be elected by the General Council of the tribe.

Subsection (d) provides that the boundary line between the Hoopa Valley and Yurok reservations, as partitioned in this section, shall be the line established by the Bissel-Smith survey and that the Secretary shall publish the boundary descriptions in the Federal Register. Use of the Bissel-Smith survey for purposes of defining the Hoopa Valley Indian Reservation results in the addition of lands to the Yurok Reservation in the upper reaches of the extension near the junction of the Klamath River with the Trinity River. The transition village known as "Peekta" Point, claimed by the Yurok Tribe, now apparently becomes part of the Yurok Reservation.

Subsection (e) provides for the management of the tribal lands of the Yurok Reservation by the Secretary until the organization of the tribe under section 9 and, thereafter, by the Yurok Tribe.

Subsection (f) provides that the State of California shall continue to have criminal and civil jurisdiction on the two reservations under Public Law 83-280 with authority to retrocede such jurisdiction to the United States.

SECTION 3 - PRESERVATION OF SHORT CASES

Section 3 provides that nothing in this Act shall affect, in any way whatsoever, the individual entitlements already established in the various decisions of the Federal courts in the so-called *Short* cases nor any eventual entry of final judgment in those cases.

When final judgment is entered in the *Short* cases, the court will have determined which of the 3,800 intervening individual plaintiffs have met the standards of the court for qualification as an "Indian of the Reservation" and will have determined the amount of monetary damages to which each such individual plaintiff is entitled from the United States. Nothing in this legislation is intended to affect the right of such individuals to that final award under the law of the case. While the Committee does not believe that this legislation, as a prospective settlement

of this dispute, is in any way in conflict with the law of the case in the *Short* cases, to the extent there is such a conflict, it is intended that this legislation will govern.

SECTION 4 - HOOPA-YUROK SETTLEMENT FUND

Subsection (a), paragraph (1), establishes a Hoopa-Yurok Settlement Fund into which the Secretary is directed to deposit all Escrow funds, together with accrued income, derived from revenue of the reservation. The definition of the Excrow [sic] funds is intended to be a comprehensive list of the funds and accounts, in federal hands, derived from the lands or resources of the joint reservation. It is estimated that this amount now totals approximately $65,000,000.

Paragraph (2) permits the Secretary to continue to make payments to the Hoopa Valley Tribe, out of the interest or principal of the Settlement Fund, for tribal governmental and management purposes, excluding per capita payments, in an amount not to exceed $3,500,000 per fiscal year. These payments will be deducted from what would otherwise be the Hoopa Valley Tribe's share as apportioned by subsection (c).

Paragraph (3) as added by the Committee authorizes the Secretary to provide appropriated funds to the Yurok Transition Team, and also authorizes the Secretary to make payments to the Yurok Transition Team, out of the interest or principal of the Settlement Fund, for the purposes for which the Yurok Transition Team is established under section 9, in an amount not to exceed $500,000 per fiscal year. These payments will be deducted from what would otherwise be the Yurok Tribe's share as apportioned by subsection (d).

Subsection (b) provides that the Secretary shall make payments from the Settlement Fund as provided in this Act and, pending dissolution of the Fund, shall administer and invest such funds as Indian trust funds are administered.

Subsection (c) directs the Secretary, upon publication of the option election date pursuant to section 6(a)(4), to pay out

of the Fund and to hold in trust for the Hoopa Valley Tribe an amount which shall be based upon the percentage arrived at by dividing the number of members of the Hoopa Tribe as of such date by the sum of the number of such members and the number of persons on the final roll prepared pursuant to section 5. After the elections pursuant to section 6 have been made, the payment to the Hoopa Valley Tribe shall be increased or decreased based on the persons who are enrolled in the Tribe pursuant to section 6. Under this formula, it is estimated that approximately $23 million will be paid to the Hoopa Tribe. This is roughly one-third of the entire Settlement Fund.

Subsection (d) directs the Secretary to make a similar payment for the Yurok Tribe with the amount being determined by dividing the number of persons on the Settlement Roll electing to be members of the Yurok Tribe by the sum of the number of members of the Hoopa Tribe, as determined under subsection (c), and the number of persons on such roll prepared under section 5. The amount allocated to the Yurok Tribe will be based on how many individuals meeting the *Short* case standards elect to become members of the Yurok Tribe. If only 25% of the adults eligible accept the Yurok membership option, approximately $6.7 million remaining in the Settlement account, for a total tribe share of $18.1 million. According to the pro-organization Yurok group the 25% membership estimate is extremely low. They estimate that the percentage accepting tribal membership will exceed 50%. If this is true the Yurok Tribe will receive in excess of $23.5 million. This is roughly one-third of the entire Settlement Fund.

Subsection (e) authorizes the appropriation of $10,000,000 for deposit in the Settlement Fund as the Federal share after Hoopa and Yurok tribal payments pursuant to section 4 and the payments to the Yurok member[s] pursuant to section 6(c) are made. The Fund, with the Federal share and with any earned income, is to be available to make the payments authorized by section 6(d).

As noted elsewhere in this report, it is in large part due to the unjust, historical treatment of California Indians by the United States, to the enactment and promulgation of confusing and ambiguous laws, and to the vacillating and uncertain policies of U.S. officials that [t]his unfortunate situation now exists. The Committee feels that $10,000,000 of Federal funds, added to the funds of the Indians, is a small price to pay to rectify this situation and permit implementation of the federal policy of government-to-government relations with the Hoopa Valley and Yurok Tribes.

SECTION 5 - HOOPA-YUROK SETTLEMENT ROLL

Subsection (a) directs the Secretary to prepare a roll of all persons who can meet the criteria established by the Federal courts in the *Short* case for qualification as an "Indian of the Reservation" and who also (1) were born on or prior to, and living on, the date of enactment; (2) are citizens of the United States; and (3) were not members of the Hoopa Valley Tribe as of August 8, 1988. The Secretary's determination is final except that plaintiffs in the *Short* cases who have been found by the Federal court to meet the qualification as an "Indian of the Reservation" shall be included on the roll if they meet the other requirements and those who are found by the court not to meet such qualifications may not be included on the roll. Persons who are not plaintiffs in the *Short* cases may also be included on the roll if they timely apply and meet the criteria established. The Committee expects the Secretary to place on the roll the names of all living Indians of the Reservation held qualified in the *Short* cases whether or not an application is timely received from such persons, since address changes or other unforeseen event may prevent persons from receiving actual notice, and the qualifications of such persons are readily verified.

Subsection (b) requires the Secretary, within 30 days of enactment, to give notice of the right to apply for enrollment under this section. It requires actual notice by registered mail

to *Short* plaintiffs, notice to their attorneys, and notice in local newspapers. Such notice is also to be published in the Federal Register.

Subsection (c) establishes the deadline for applications as 120 days after the Federal Register publication in subsection (b).

Subsection (d), paragraph (1), provides that the Secretary shall make his determinations of eligibility and publish a final roll in the Federal Register 180 days after the date established in subsection (c).

Paragraph (2) requires the Secretary to establish procedures for the consideration of appeals from applicants not included on the final roll. These appeals will not prevent the roll from being made final. Successful appellants are to be later added to the roll and any payments they become entitled to, as a result of the election of options, are to be paid from any funds remaining in the Settlement Fund before payment to the Yurok tribe as provided in section 7. The subsequent inclusion of such persons on the roll, and any election of option they may make, are not to affect any calculations made for the payments to the Hoopa and Yurok Tribe under section 4. However, deletion of persons found erroneously to have been included on the roll may lead to adjustment of the calculations and payments made under section 4.

Subsection (e) provides that anyone not included on the final Settlement Roll shall not have any interest in the Hoopa Valley Reservation, the Hoopa Valley Tribe, the Yurok Reservation, or the Yurok Tribe or in the Settlement Fund unless they may be subsequently admitted to tribal membership by either of those tribes. The provisions of this subsection are not intended to imply an congressional determination that such persons do now have any such interest. Nor are these provisions intended to imply that the federal Indian status of any person would be lost by omission from the final Settlement Roll. These are not termination provisions, as explained under section 6(d).

SECTION 6 - ELECTION OF SETTLEMENT OPTIONS.

As noted elsewhere, the court has determined that, while the lands and resources of the Hoopa Valley Reservation as now constituted are tribal or communal property, neither the Hoopa or Yurok Tribe nor any other tribe has a vested right in such property. Where the tribal property right is vested, if at all, is problematical and probably remains with the United States subject to disposition pursuant to the rationale of the *Hynes* v. *Grimes Packing Co.* case.

In any case, under the general theories of Federal-Indian law and under the law of the case of the *Short* cases, it is the Committee's conclusion that no individual, including persons meeting the qualifications of the court as an "Indian of the Reservation" or members of the Hoopa Valley Tribe, separately or collectively, have any legally enforceable right in the lands and resources of the reservation.

Therefore, the settlement provisions of this section are not to be construed as a congressional recognition, directly or impliedly, that such individuals have any such right or that the payments or benefits conferred by this section are in payment for the taking of any such rights. The Committee is seeking to further the responsibility of the Congress and the United States as the trustee and guardian of Indian tribes and property to resolve the chaos and uncertainty now affecting these Indians, these tribes, and this property. The benefits made available to individuals under this section are a recognition that they may have an inchoate or expectancy interest in such property and that, as a matter of fairness, they should be given reasonable options for settlement.

It is also the Committee's intent that the election of an option under this section, together with all the valuable benefits which flow therefrom, shall constitute a waiver by the individual so electing of any claim such person may have against the United States arising out of this Act except those created by sections 5 and 6.

Subsection (a), paragraph (1), provides that, 60 days after publication of the Settlement Roll, the Secretary shall give notice by registered mail to all adult persons on the roll of their right to elect an option under the Act.

Paragraph (2) provides that the notice must be comprehensive with an objective analysis of advantages and disadvantages of each option, but couched in easily understood language. S. 2723, as introduced, would provide that the election of an eligible adult would bind minor children under their guardianship who are also on the roll. The Committee deleted this provision and amended paragraphs (2) and (3) [to] provide that minor children will be deemed to have elected membership in the Yurok Tribe, with certain exceptions. In addition, the Committee added language specifying that the notice discuss counseling services that the Yurok Transition Team and the Secretary shall provide, and the affidavit requirement of section 6(d).

Paragraph (3) as amended by the Committee, automatically makes minors on the roll members of the Yurok Tribe unless the parent or guardian comes forward with proof, satisfactory to the Secretary, that the minor is enrolled in another tribe that prohibits members from enrolling elsewhere. Thus, in the case of a child who is already an enrolled member of another federally recognized tribe, such parent or guardian may elect the tribe in which such child will be enrolled. Therefore, with respect to minors on the roll who do not also have a parent or guardian on the roll, notice is to be given to the parent or guardian of such minor. The paragraph further directs that the minor's funds be invested and administered as Indian trust funds, like the Settlement Fund itself, until the age of majority is reached.

Paragraph (4) provides that the Secretary shall establish the deadline for making a choice as the date which is 120 days after the date of promulgation of the Settlement Roll as provided in section 5(d). Persons not making an election by the date established under this paragraph are deemed to have

made an election under subsection (c). The Committee believes it is important that no person on the Hoopa-Yurok Settlement Roll lose benefits and privileges flowing from Yurok tribal membership and connection with the Yurok Reservation by virtue of inadvertence, failure to receive actual notice, accident or other unforeseeable events. Accordingly, persons failing to act timely will be deemed to have elected Yurok tribal membership if they accept and cash the check representing the payment authorized by subsection (c).

The Committee believes that acceptance of the payment also establishes the consensual release of rights that accompanies this election. On the other hand, one who fails or refuses to make an election, and refuses to accept the payment authorized by subsection (c) may not be deemed to have granted a release or to have granted a proxy to the Yurok Interim Tribal Council. Thus, refusing to accept the payment is one method by which persons who do not wish to join the Yurok Tribe may avoid becoming members. Persons already enrolled in another Indian tribe that prohibits dual enrollment may, for example, wish to decline Yurok tribal membership. In addition, a person who becomes a member of any Indian tribe is at liberty to terminate the tribal relationship whenever he or she so chooses. E.g., F. Cohen, Handbook of Federal Indian Law 22 (1982 Ed.).

Subsection (b), paragraph (1), provides that any person on the roll, 18 years or older, who can meet certain membership criteria of the Hoopa Valley Tribe as established by the U.S. Claims Court and who (1) maintains a residence on the reservation on the date of enactment; (2) had, within five years prior to enactment, maintained such residence; or (3) owns an interest in real property on the reservation can elect to become a member of the Hoopa Valley Tribe.

Paragraph (2) provides that the Secretary shall cause such person to be so enrolled notwithstanding any laws of the Hoopa Valley Tribe to the contrary and, after being so enrolled, such person will be a full member of the tribe for all purposes.

Paragraph (3) provides that the Secretary will assign to such person the degree of Indian blood or Hoopa Indian blood, as appropriate, based upon the criteria established by the Federal Court in the *Short* case.

Paragraph (4) provides that any person making such an election shall no longer have any interest in the Yurok Reservation, the Yurok Tribe, or the Settlement Fund. This paragraph and paragraphs (c)(4) and (d)(2) do not contemplate that such persons now have any particular interest, but that, to the extent they do, it will be automatically relinquished upon an election of one of the options.

Subsection (c), paragraph (1), provides that any person on the final roll may elect to become a member of the Yurok Tribe and participate in the organization of the tribe pursuant to section 9.

Paragraph (2) provides that persons making such election shall form the base membership roll of the Yurok Tribe and the Secretary shall assign to a person making such an election the degree of Indian blood determined using the criteria of the Federal court.

Paragraph (3) directs the Secretary, to pay to each person under age 50 and making an election under this subsection $5,000 out of the Settlement Fund; $7,500 for those age 50 or older. These sums were established on the basis of the Committee's amendment. The distribution of such funds shall be subject to the provisions of Section 7 of the Act of October 19, 1973 (87 Stat. 466), as amended (25 U.S.C. ' 1407).

Paragraph (4) provides that persons making an election under this subsection shall no longer have any interest in the Hoopa Valley Reservation or the Hoopa Valley Tribe or, except as provided in paragraph (3), in the Settlement Fund. As amended by the Committee, additional language is included to provide that the exercise of the option shall authorize the Yurok Interim Council to waive claims of the Yurok Tribe against the United States.

Subsection (d), paragraph (1), provides that any person on the final roll can make an election to receive a lump sum payment from the Settlement Fund and directs the Secretary to pay to each such person the amount of $15,000 out of the Settlement Fund. This sum was decreased from the $20,000 provided in S. 2723 as originally introduced. Election of this option, however, has been conditioned by the Committee upon completion of an affidavit concerning counseling regarding the effects of such an election. This subsection does not suggest, and the Committee does not intend that this Act change the federal Indian status of any person, regardless of the option elected, nor does this Act end federal trust restrictions that may exist as to any allotted or unallotted trust land, property[,] resources or rights. The option provided by section 6(d) is not a termination provision; it merely offers a lump-sum payment to persons on the settlement roll who wish to have no future interests or rights in the tribal, communal, or unallotted land, property, resources, or rights in the tribal, communal, or unallotted land, property, resources, or rights of the Hoopa Valley Reservation or the Yurok Reservation or the Hoopa or Yurok tribes. By contract [sic], the language of the Western Indians Termination Statute declared that the purpose of the Statute was, among other things, "for a termination of Federal services furnished such Indians because of their status as Indians." 25 U.S.C. 691. That termination Act provided that:

> Thereafter individual members of the Tribe shall not be entitled to any services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians . . . shall no longer be applicable to the members of the Tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. 25 U.S.C. 703(a)(1982)

Neither section 6(d) nor any other provision of this Act is so intended. This Act does not represent a return to a national policy of termination or of encouraging tribal members to withdraw from their tribes. However, the circumstances concerning this reservation and the complex litigation which has prevented tribal self-determination justify the congressional role in restoration of tribal self-governance represented by this Act.

Paragraph (2) provides that any person making an election under this subsection shall no longer have any interest in the Hoopa Valley Reservation, the Hoopa Valley Tribe, the Yurok Reservation, and the Yurok Tribe and, except as provided in paragraph (2), in the Settlement Fund.

SECTION 7 - DIVISION OF SETTLEMENT FUND REMAINDER

Subsection (a) provides that any funds remaining in the Settlement Fund after payments made pursuant to section 6 and to successful appellants shall be shall be held in trust by the Secretary for the Yurok Tribe.

Subsection (b) provides that funds apportioned to the two tribes by section 4 and 6 shall not be available for per capita distribution for a period of ten years after the date of division made under this section. Other tribal funds, or income of the apportioned funds, are not intended to be restricted by this subsection. As amended by the Committee this would allow the Hoopa Tribe to make one or more per capital payments to its members from such funds, totalling not more than $5,000, a sum similar to that provided for those electing to become members of the Yurok Tribe. There is no provision for a bonus payment to those 50 years or older since no election is involved and the Hoopa members have been receiving the full range of federal services over the years. Under the Act of August 1, 1983, the Committee understands that payments on behalf of

minor tribal members shall be held in trust accounts and invested for the minors.

SECTION 8 - HOOPA VALLEY TRIBE; CONFIRMATION OF STATUS

Section 8 preserves, ratifies, and confirms the existing status of the Hoopa Valley Tribe as a Federally-recognized tribe and reinstates full recognition of its governing documents and governing body as heretofore recognized by the Secretary.

In the record before the Committee and in the findings of the court in the *Short* cases, some significance is attached to the fact that some members of the Hoopa Valley Tribe had admixtures of the blood of the Yurok or other tribes or, in some cases, that such admixture was greater than their Hoopa blood. The Committee does not attach any significance to this fact by itself nor does it find that this admixture of tribal blood detracts from the integrity of the Hoopa Valley Tribe as a tribe of Indians. Most, if not all, Federally-recognized Indian tribes have members who are not of the full degree of blood of the ancestral tribe. Through inter-tribal marriages, most Indian tribes have a membership of mixed Indian blood. Indeed, most have a membership with mixed Indian and non-Indian blood. The Hoopa Valley Tribe clearly has and continues to function as an Indian tribe in the political sense.

SECTION 9 - RECOGNITION AND ORGANIZATION OF THE YUROK TRIBE

This section provides for the development of a membership for a Yurok Tribe and for its organization. The Committee realizes that there may be some people on the Settlement Roll who will have little or no Yurok Indian blood who may wish to select this option. The discussion under section 8 above is relevant here.

Subsection (a), paragraph (1), provides that those persons electing the Yurok Membership option under section 6 shall form the base roll of the Yurok Tribe whose status as a Federally-recognized tribe, subject to the adoption of the Interim Council resolution required by subsection (c), is ratified and confirmed. The Committee substituted the term "Interim Council" for the term "General Council."

Paragraph (2) provides that the Indian Reorganization Act of 1934 shall apply to the Yurok Tribe.

Paragraph (3) directs the Secretary promptly to consult with the Select Committee on Indian Affairs, the House Insular and Interior Affairs Committee and any other appropriate committee and, within 30 days of enactment, appoint five individuals to compromise [sic] the Yurok Transition Team. Since the Interim Council will not be nominated or elected until after preparation of the Settlement Roll and election of options, a process that will take over one year, a Transition Team to aid the Yurok Tribe's organizational process is essential.

A key function of the Yurok Transition Team is to provide counseling to persons who are or may be eligible for inclusion in the Hoopa-Yurok Settlement Roll with respect to inclusion in the Settlement Roll, the advantages and disadvantages of each of the settlement options available under section 6, and related issues. In particular, the Yurok Transition Team must counsel people concerning the current or potential benefits which will or may be derived by membership in the Yurok Tribe or the Hoopa Valley Tribe, and from connections with the Yurok or Hoopa Valley reservation. This must include discussion of any possible effect on the future tribal membership of children of individuals who may elect the option of sections 6(c) and 6(d). However, this paragraph does not suggest, and the Committee does not intend that any part of this Act change the federal Indian status of any person, for purposes of programs and benefits in which membership in a federally recognized Indian tribe is not a prerequisite, regardless of the option

elected. Nor does this Act end federal restrictions that may exist as to any allotted or unallotted trust land or resources. As noted elsewhere, the option provided by section 6(d) is not a termination provision; and it should not be portrayed as such; the subsection merely offers a lump-sum payment to persons on the Settlement Roll who wish to have no future interest or right in the tribal, communal, or unallotted land, property, resources, or rights of the Hoopa Valley Reservation or the Yurok Reservation or the Hoopa or Yurok tribes.

Subsection (b) provides for the creation of an Interim Council for the Yurok Tribe of five members to represent the Yurok Tribe in the implementation of the Act and to act as the tribal governing body until a tribal council is elected under a constitution adopted pursuant to this section.

Subsection (c), paragraph (1), provides that the Secretary, within 30 days of the deadline for election of options, shall prepare a list of all adults on the Settlement Roll who elected the Yurok Membership option who will constitute the eligible voters of the tribe for organizational purposes. The Secretary must send them notice of date, time, purpose, and order of procedure of the general council meeting to be scheduled pursuant to paragraph (2).

Paragraph (2) provides that, within a set time after such notice, the Secretary shall convene a general council meeting of the Yurok Tribe on or near the Yurok Reservation. The business of such meeting is to nominate candidates for election to the Interim Council. Only persons on the list prepared under paragraph (1) are eligible for nomination. As amended by the Committee the resolution waiving claims against the United States may be executed by the Interim Council based upon the proxies received from persons electing tribal membership.

Paragraph (3) provides that, within 45 days after the general council meeting, the Secretary shall conduct an election for the Interim Council from among the persons nominated. Absentee balloting and write-in voting is to be permitted. The

Secretary must give the eligible voters adequate notice of the election.

Paragraph (4) requires the Secretary to certify the results of the election and to convene an organizational meeting of the newly elected Interim Council.

Paragraph (5) provides that vacancies on the Council shall be filled by a vote of the other members.

Subsection (d), paragraph (1), provides that the Interim Council shall have no powers except those conferred by this Act.

Paragraph (2) provides that the Council shall have full authority to secure the benefits of Federal programs for the tribe and its members, including those administered by the Secretary of the Interior and the Secretary of Health and Human Services and shall have authority to execute the necessary waiver of claims against the United States, and consent to allocation of the escrow funds to the Settlement Fund.

Paragraph (3) provides that the Council shall have such other powers as the Secretary normally recognizes in an Indian tribal governing body, except that it may not legally or contractually bind the tribe for a period in excess of two years from the date of their election. The Committee's amendment revised this language to provide that any contract of more than two years duration will be subject to disapproval by the Secretary of the Interior under limited circumstances.

Paragraph (4) provides that the Interim Council shall appoint a drafting committee which shall be responsible for the development of a draft constitution for submission to the Secretary.

Paragraph (5) provides that the Interim Council shall be dissolved upon election of the initial governing body under such constitution when adopted or at the end of two years after their installation, whichever occurs first.

Subsection (e) provides that the Secretary, upon the request of the Interim Council and the submission of the draft constitution, shall take all steps necessary under the provisions

of the Indian Reorganization Act for the adoption of a tribal constitution and the election of the initial tribal council under such constitution when adopted. The Committee recognizes that the Yurok Tribe has a sovereign right to select tribal membership provisions for its constitution. The Tribe may prohibit the dual enrollment of Yurok tribal members in other Indian tribes, for example, as many other tribes do. Both because it is the Yurok Tribe's right to determine its membership criteria and because the Tribe will have to live with the consequences of its decision, the Committee is reluctant to require inclusion of specific membership provisions. Nevertheless, the Committee hopes and presumes that children born after the date of enactment of this Act (who of course are not included in the Hoopa-Yurok Settlement Roll) and who meet the applicable Indian blood requirement, if any, established by the Yurok Tribe, but whose parents may have elected the option of section 6(d) will nevertheless be favorably considered for enrollment in the Yurok Tribe although their parents may not be members of the Yurok Tribe. The Committee is concerned that an injustice will occur if the Yurok Tribe prohibits the enrollment of children born after the date of enactment of this Act who possess the necessary blood quantum required by the Yurok Tribe's constitution, but whose parents elected the lump-sum option instead of enrollment in the Yurok Tribe.

It is not intended by this section that the Indian Reorganization Act shall provide the only means by which the Yurok Tribe may be organized. Nor does the Committee intend that the Constitution prepared by the drafting committee pursuant to subsection (e) is the only one upon which the Secretary may conduct an election in the future.

SECTION 10 - ECONOMIC DEVELOPMENT

The amendment added a new Section 10 directing that a plan for economic self-sufficiency for the Yurok Tribe be

developed and submitted to Congress by the Secretary of the Interior, in conjunction with the Interim Council of the Yurok Tribe and the Yurok Transition Team, to determine the long-term needs of the Tribe. The Secretary is expected to seek the assistance and cooperation of the secretaries of Health and Human Services and other federal agencies. The Committee is aware that the Yurok Tribe has not received the majority of services provided to other federally recognized tribes. As a result, it lacks adequate housing and many of the facilities, utilities, roads and other infrastructure necessary for a developing community. In addition, the Committee is aware that many of the road, realty and fisheries management services on the "Addition" have been provided in the past by the Hoopa Valley Tribe. The Committee is, therefore, concerned about how the Bureau of Indian Affairs plans to address these needs, and directs the Secretary to work with the Yurok Tribe to develop proposed solutions to these and other related problems. The Committee is specifically interested in the feasibility and cost of constructing a road from U.S. Highway 101 to California Highway 96. It is also concerned that the Department of the Interior does not currently have adequate land records and surveys of the "Addition". The Committee, therefore, expects that the Department will conduct all necessary surveys to ascertain the legal status of such lands. It also expects the plan to address such things as the number of additional federal employees required to service the Yurok Tribe and placement of the Tribe's facilities construction needs on the BIA, IHS, and other federal agency construction priority lists. The Committee wishes to clarify, however, that the development of this plan should in no way delay the provision of services to the Yurok Tribe and/or the construction of federal and tribal facilities.

SECTION 11 - SPECIAL CONSIDERATIONS.

This Section was designated Section 10 in S. 2723, as introduced.

Subsection (a) provides that the 20-acre land assignment on the Hoopa Valley Reservation made by the BIA in 1947 to the Smokers family shall continue in effect and may pass by descent or devise to relatives of one-fourth or more Indian blood of members domiciled on the assignment as of the date of enactment.

Subsection (b) provides that within 90 days after enactment, the Secretary shall conduct elections for the Resighini, Trinidad, and Big Lagoon, Rancherias concerning merger with the Yurok Tribe. If a majority of those voting approves, the Rancherias should fully merge their lands, assets and membership with the Yurok Tribe. The Secretary is to publish in the Federal Register notice of the effective date of any such merger. The Committee deleted reference to Blue Lake, Smith River, Elk Valley, and Tolowa Rancherias on the grounds that these rancherias are not historically of Yurok origin. A new subsection (c) was added to provide protection for existing property rights.

SECTION 12 - KLAMATH RIVER BASIN FISHERIES TASK FORCE

Subsection (a) amends the Act of October 27, 1986, establishing the Klamath River Basin Fisheries Task Force, by providing for a representative of the Yurok and of the Karuk Tribes on such task force. The Secretary is to appoint the first Yurok representatives who will serve until the Yurok Tribe is organized and appoints its own representative.

Subsection (b) provides that the term of the initial Yurok and Karuk members appointed shall be for that time remaining on the terms of existing task force members and, thereafter, as provided by the provisions of the 1986 Act.

SECTION 13 - TRIBAL TIMBER SALES PROCEEDS USE

Section 11 amends section 7 of the Act of June 25, 1910 (25 U. S. C. 407) by making clear that timber sales proceeds from Indian reservations shall be used only for the benefit of the tribe or tribes located on such reservations and their members.

In the *Short* case, the Circuit Court interpreted section 407, as applicable to the facts and circumstances of that case, in a manner which could cause mischief if applied to other Indian tribes and other facts and circumstances. The amendment simply makes clear that revenue from tribal timber resources are to be used solely for the tribes located on such reservation and, through such tribes, their members.

SECTION 14 - LIMITATIONS OF ACTIONS; WAIVER OF CLAIMS

A statute of limitations is very necessary to avoid uncertainty about the possible applicability of 28 U.S.C. §§ 2501 (six years), 2409a (12 years) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (no statute of limitation). The Committee finds that the periods provided in this section are reasonable under the circumstances. Further, the limitations here are rationally related to fulfillment of Congress' unique obligation to Indian tribes and individuals. E.g., *Littlewolf* v. *Hodel*, 681 F. Supp. 929 (D.D.C. 1988).

Subsection (a) provides that any claim challenging the constitutionality of this Act as a taking under the 5th Amendment of the Constitution shall be brought in the United States Claims Court under sections 1491 and 1505 of title 28, United States Code.

Subsection (b), paragraph (1), provides that any such suit by an individual, entity, or tribe other than the Hoopa Valley or Yurok Tribes, shall be barred unless brought within 210 days

of the date of partition of the joint reservation or 120 days after the date for the election of options as established by section 6(a)(3), whichever is later.

Paragraph (2) provides that any such claim by the Hoopa Valley Tribe must be brought within 180 days of enactment or be barred.

Paragraph (3) provides that any such claim by the Yurok Tribe must be brought within 180 days of the date of the general council meeting under section 9(c)(2)(A) or be barred.

Again, the Committee reiterates its conclusion that no individual or tribe has a vested, constitutionally protected right in the lands and resources of the joint reservation. The statute of limitations in this subsection are simply included to bring about some certainty and out of an abundance of caution.

Subsection (c) provides that the Secretary shall make a report to the Congress on any final judgment in any litigation brought pursuant to this section together with any recommendations deemed necessary. New language was added by the Committee to provide for a stay of payment of any judgment that might be rendered against the United States, in order to provide time for the Department to provide Congress with a report.

SECTION 15 - HEALTH ISSUES

A new Section 15 was added to provide for clean up of dump sites on the newly established Yurok Reservation. The Secretary of Health and Human Services and the Secretary of the Interior are directed to enter into a memorandum of understanding with Humboldt County for the clean up and maintenance of these sites. Costs are estimated at approximately $40,000 for the clean up and $8,000 per year for maintenance.

COST AND BUDGETARY CONSIDERATIONS

The authorization levels and purposes for which funds may be expended set forth in S. 2723 are identical to the companion bill, H.R. 4469, reported out of the House Committee on Interior and Insular Affairs on August 10, 1988. The cost estimate for H.R. 4469, and thus S. 2723, are set forth below:

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

SEPTEMBER 9, 1988.

1. Bill number: H.R. 4469.
2. Bill title: Hoopa-Yurok Settlement Act.
3. Bill status: As amended and ordered reported by the House Committee on Interior and Insular Affairs, August 10, 1988.
4. Bill purpose: This bill would, if certain conditions are met, partition specified joint Indian reservation lands in northern California into the Hoopa Valley Reservation and the Yurok Reservation. It would also establish the Hoopa-Yurok Settlement Fund, and require the Secretary of the Interior to deposit into it escrow funds and interest earnings from designated trust accounts. The bill would require the Secretary to make distributions from the fund into trust accounts for the Hoopa Valley and Yurok tribes, and to make payments to eligible individuals electing certain tribal membership options. The bill authorizes the appropriation of $10 million to be deposited into the Settlement Fund for the purpose of making lump-sum payments to such individuals.

The bill would also require the Secretary of the Interior to administer the partitioning of the lands and the two tribes. This responsibility would include specifying the reservation lands and boundaries, preparing an eligibility roll and final Settlement Roll, providing for the election of a settlement option by those

on the Settlement Roll and establishing them as tribal members, organizing a general council meeting of the Yurok Tribe, and providing for the election of an Interim council for that tribe. The bill permits the Secretary to use up to $5 million of Bureau of Indian Affairs (BIA) funds to acquire lands or interest in lands for the Yurok Tribe or its members.

5. Estimated Cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Estimated authorization level	10	([1])	.....	.....	.....
Estimated outlays	([1])	10	.....	.....	.....

[1] Less than $500,000

The costs of this bill fall within budget function 450.

Basis of Estimate

The estimated costs of this bill reflect the authorization and distribution of $10 million for lump-sum payments of $20,000 each to eligible individuals choosing not to become members of either the Hoopa Valley or Yurok Tribes. Based on information provided by the BIA, the number of individuals expected to choose this option is at least 500, the number that would exhaust $10 million authorization.

Additional lump-sum and other payments required under this bill would come out of the Settlement Fund, which would have a balance of more than $50 million. The Settlement Fund money is currently being held in escrow and, in the absence of legislation, would be available for distribution upon resolution of a pending court claims [sic]. The estimate assumes that the bill would not significantly affect the timing or amount of

spending of the amounts currently held in escrow relative to current law.

The administrative task associated with partitioning the reservation and the tribes are estimated to result in additional costs of approximately $500,000 in the first two fiscal years after enactment. We estimate no additional costs for land acquisition, based on information provided by the BIA that the agency would not exercise the authority provided in the bill for such activity. Other provisions of the bill are not expected to result in significant additional cost.

6. Estimated cost to State and local governments: None.
7. Estimated comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Carol Cohen.
10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2723, as amended, will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received the following statements from the Department of the Interior and the Department of Justice at its hearing on September 14, 1988:

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman and members of the Committee. I am pleased to be here today to discuss S. 2723, a bill "To partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes."

We object to enactment of S. 2723 unless it is amended to meet our concerns, especially with regard to the deletion of an unjustified Federal contribution of $15 million, we would recommend that the President veto the bill.

Since the 1950's there has been a dispute among the Indians of the Hoopa Valley Reservation in Northern California as to who is entitled to share in the timber proceeds from the "Square" portion of that Reservation. (The Square is in Hoopa Valley, and the "Extension" follows the Klamath River to the Pacific.) Following a 1958 opinion of the Solicitor's Office that the Hoopa Valley Tribe was entitled to receive all the timber income, individual Indians, now numbering some 3800 of Yurok and other tribal groups, brought suit in 1963 for damages for their exclusion from shares in the income (*Jessie Short, et al. v. United States*, No. 102-63, United States Claims Court). The Yurok Tribe has never organized itself as a political or corporate entity, and thus has no spokesmen or official representatives.

At the time the litigation was begun, the Square was treated as a separate reservation from the Extension. In 1973, the Court of Claims held that there was but a single reservation. Subsequently, the Court ruled that all the "Indians of the Reservation" are entitled to participate in per capita distributions of the income from the timber on the unallotted (tribal) lands of the Square. From 1974-1978 efforts were made to determine the identity of the "Indians of the Reservation" and to mediate a settlement.

In 1979, the Government moved to substitute the Yurok Tribe for the 3800 individual plaintiffs, and the Hoopa Valley Tribe, as intervenor, moved to dismiss the case. In 1981, the Court of Claims denied the motions and ruled that successful plaintiffs would be determined on standards similar to the standards for membership in the Hoopa Valley Tribe. The Federal Circuit Court of Appeals affirmed. The petitions for certiorari filed by the Hoopa Valley Tribe and 1200 of the plaintiffs, the third unsuccessful effort to obtain certiorari in the case, were denied by the Supreme Court on June 19, 1984.

In 1980 another suit was filed (*Lillian Blake Puzz, et al. v. United States et al.*, No. C-80-2908 TEH, U.S.D.C., N.D. California) by six individuals claiming to be Indians of the Hoopa Valley Indian Reservation whose rights to participate in reservation administration and to benefit from the reservation's resources were allegedly denied by the Federal Government in violation of their constitutional rights to equal protection.

Plaintiffs' claims were initially premised on individual Indian ownership of the unallotted reservation resources, although they later also asserted that all "Indians of the Reservation" constituted one tribe, and that all individual Indians should have a vote in that tribe's government. The Government's position was that the reservation was created for Indian tribes, not individual Indians, and that the recognition of Indian tribes is a political question for determination by the Congress and the Executive Branch and such determinations are not reviewable by the courts.

On April 8, 1988, the court issued an order in which Judge Henderson agreed with the Government that the reservation was created for Indian tribes except that the Hoopa Valley Reservation was not created for a single tribe but for "all tribes which were living there and could be induced to live there." Order at p. 7. The court concluded that Federal recognition of the Hoopa Tribe did not give the tribe exclusive control over any reservation lands and resources.

The court also found that the individual plaintiffs have standing to litigate reservation management issues and that the 1864 statute authorizing the creation of the reservation imposed a trust responsibility on the U.S. Government extending to all the Indians of the Reservation.

Having addressed these issues the court ordered three specific actions:

1. The Federal defendants may lawfully allow the Hoopa Business Council (HBC) to participate in reservation administration, and the HBC may lawfully conduct business as a tribal body sovereign over its own members, and, as an advisory body, participate in reservation administration;

2. Federal defendants shall not dispense funds for any project or services that do not benefit all Indians of the reservation in a non-discriminatory manner. Federal defendants shall exercise supervisory power over reservation administration, resource management, and spending of reservation funds, to ensure that all Indians receive the use and benefits of the reservation on an equal basis. Specifically, Federal defendants shall not permit any reservation funds to be used for litigation among Indians or tribes of the reservation.

3. To fulfill the requirements of this Order, Federal defendants must develop and implement a process to receive and respond to the needs and views of non-Hoopa Valley tribal members as to the proper use of reservation resources and funds.

On June 7, 1988, we submitted to the court a plan of operation for the management of the Hoopa Valley Reservation resources, as required by the court's April 8, 1988 order. On September 2, 1988 the court denied plaintiffs' motion to strike the plan, although it emphasized that the issues raised in that motion would have to be addressed if this legislation is not enacted and the court is left with the task of approving a final long-term plan for the management of the reservation.

Obviously, the District Court's orders are changing the management of the reservation and its resources. However,

we do not believe that they provide the appropriate vehicle for a satisfactory permanent resolution to all the problems on the Hoopa Valley Indian Reservation. We believe that partitioning the communal reservation and encouraging the Yuroks to organize as a tribe would lead to more satisfactory results.

Now I would like to address our major concerns regarding S. 2723. I have attached our technical concerns to my written statement.

S. 2723 partitions the Hoopa Valley Reservation only if the Hoopa Valley tribe passes a resolution waiving any claims they may have against the United States arising out of the provisions of the Act. The resolution must be presented to the Secretary within 60 days of enactment of the Act. The Secretary then publishes the resolution in the Federal Register and the existing communal reservation becomes two reservations. The "square" would become the Hoopa Valley Reservation and the "extension" would become the Yurok Reservation. Additional forest service land would be added to the Yurok Reservation and an authorization of $5 million would be provided for the purchase of additional land for the Yurok Reservation.

We do not believe that expanding the reservation is necessary at this time and strongly oppose the addition of Federal money for this purpose. Currently, there are approximately 400 Yuroks living on the "Extension" which includes 5,373.9 acres (including tribal land and allotments). We recommend that this provision be deleted.

Upon enactment of the act, the existing $50 million communal escrow account is to become the basis of a settlement fund. An additional $10 million is authorized to be appropriated to add to the fund. We do not believe the settlement fund should be established until the communal reservation is partitioned. Further, we believe that the bill should not become effective (except for section 12) until the Hoopa Valley Tribe adopts and sends to the Secretary, the resolution called for in section 2(a).

We strongly oppose the addition of Federal money to this fund and believe that the distribution of the fund should be used for making the payments under section 6 and giving any remaining funds to the Yurok Tribe. The partition of the communal reservation and the commu[n]al escrow account should not require the addition of Federal funds. If the amount in the escrow fund is not sufficient, we believe the per capita amounts available to individuals under the bill should be changed so that the escrow funds cover those payments. We believe the bill should be amended to specify that if adequate funds are not available in the Settlement fund to make the payments, such payments shall be pro-rated accordingly. Any funds remaining in the Settlement Fund after all payments have been made or provided for, should be held in trust for the Yurok Tribe.

The Secretary is to prepare a settlement roll of all persons who can meet the criteria established by the Federal court in the *Short* case for qualification as an "Indian of the Reservation". The Secretary is to provide each eligible person the opportunity to choose one of the following options: 1) become a member of the Hoopa Valley Tribe (if appropriate criteria are met); 2) become a member of the Yurok Tribe and receive a $3000 payment; or 3) elect to receive a payment of $20,000 and give up all rights to the reservation and all rights to membership in the Yurok Tribe.

Parents and guardians of children on the Settlement Roll under the age of 18 would choose an option for their child.

Although we do not object to the provision allowing parents or guardians making the choice for minor children, we believe that the children's payments should be held in trust until they reach age 18. The Settlement Fund could remain in effect and draw interest until each minor reaches age 18 and receives their payments.

We further recommend that the Settlement Roll be established as of the date of the partition of the communal reservation rather than as of the date of enactment of the Act.

This could assure that the roll would include all persons having an appropriate interest at the time of the partition. Anyone born after the partition would of course, not have a interest in the previous single communal reservation.

Section 9 provides for the organization of the Yurok Tribe under the Indian Reorganization Act. Within 45 days of the official notice the Secretary shall convene a general council meeting of the eligible voters of the Yurok Tribe. The General Council would vote on the adoption of a resolution waiving any claim the Tribe may have against the United States arising out of the provisions of this Act and to nominate candidates for an interim council. The general council would elect an Interim Council to represent the tribe until a constitution and tribal council are in place, or for 2 years, which ever is the shorter period. The Interim Council would appoint a drafting committee to draft a tribal constitution and request the Secretary to authorize an election to vote on the constitution.

The time required for the Secretary to provide notice, call general council meetings, and hold elections is unreasonable. The Bureau would not be able to meet such requirements. Amended requirements are included in our technical amendments attached to my written statement.

We would also commend [sic] that the tribe be required to have a constitution and an elected tribal council before they enter into contracts or receive grants from the Federal Government. Under the bill the Interim Council could enter into a contract and then after two years the council would be dissolved. We do not believe this is either good management or fair to the tribal members who m[a]y receive services under the contract.

Section 13 provides for statute of limitations for any claim brought against the United States challenging the partition of the communal reservation under this act. We defer to the Department of Justice on these provision[s].

Mr. Chairman, we urge the Committee to amend the bill to meet our concerns, particularly with respect to the

appropriation authorization of $15 million. I have attached a number of technical concerns to my written statement.

This concludes my prepared statement. I will be pleased to answer any questions the Committee may have.

RECOMMENDED AMENDMENTS TO S. 2723

Section 1(b)(7) defines Karuk Tribe as organized after a special election conducted by the United States Department of the Interior, Bureau of Indian Affairs. The Bureau of Indian Affairs did not hold a special election. We recommend the following amendment:

Section 1(b)(7) line 16 (page 3) after "constitution" delete "after a special election conducted by the United States Department of the Interior, Bureau of Indian Affairs" and change "April 18" to "Aprill [sic] 6".

Section 2(c)(3)(A) provides authority for the Secretary to take additional land into trust status for the Yurok Tribe. We recommend that the provision clarify that the land would be part of the Yurok Reservation. We recommend the following amendment:

Section 2(c)(3)(A) line 8 (page 7) add at the end "and that such lands may be declared to be part of the Yurok Reservation".

Section 4(a) establishes a Settlement Fund upon enactment of this act. We believe the fund should be established upon the partition of the reservation. We recommend the following amendment.

Section 4(a) line 8 (page 9) delete "enactment of this Act" and insert "the partition of the Hoopa Valley Reservation under section 2 of this act".

Section 4(a)(2) permits the Hoopa Valley Tribe to use up to $3.5 million annually out of the income or principal of the Settlement Fund for tribal, non-per capita purposes. We believe the Yurok Tribe should also be able to draw this account. We recommend that Sec. 4(a)(2) line 12 (page 9) be amended as follows:

"(2) Until the distribution is made to the Hoopa Valley and Yurok Tribes under subsection (c), the Secretary may distribute to both tribes an amount not to exceed income and interest earned less 10 per cent for the current operating year out of the Settlement Fund. These funds may be used for tribal purposes and may not be distributed as per capita payments."

Section 4(b) on page 9, line 23 should be amended by striking out "pending" and inserting in lieu thereof "pending payments under section 6 and".

Section 4(c) line 3 (page 10) and 4(d) line 13 refer to the wrong paragraph. Section 6(a)(3) should be changed to "6(a)(4)".

Subsections (c), (d), and (e) of section 4 on page 10, line 1 through page 11, line 6 should be deleted.

Section 5 provides for the Secretary to establish a Settlement Roll of eligible persons living on the date of enactment of this Act. We recommend that the roll be established as of the date of the partition of the reservation to avoid any possible problems regarding the status of a person born between the time of enactment of the Act and the partitioning of the reservation. We also recommend that the Secretary be given more time to complete the necessary procedures for establishing the roll. The following amendments are recommended:

Section 5(a)(A) line 20 (page 11) change "of enactment of this Act" to "of the partition under section 6(a)".

Section 5(b) line 24 (page 11) change "thirty" to "one hundred and twenty".

Section 5(d) line 22 (page 11) change "one hundred and eighty days" to "two hundred and forty days".

Section 6 requires the Secretary to notify all eligible persons of the options available to them under the act. We believe it should be clear that each individual must choose one option. We also recommend that notice be given by certified

mail rather than by registered mail. We recommend the following amendments:

Section 6(a) line 23 (page 13) change "registered" to "certified".

Section 6(a) line 1 (page 14) after "elect" insert "one of".

Section 6(a)(3) (page 14) should be amended to designate paragraph "(3)" as "(3)(A)" and add a new subparagraph "(B)" as follows:

> "(B) The funds entitled to such minors shall be held in trust by the Secretary until the minor reaches age 18. The Secretary shall notify and provide payment to such persons including all interest accrued."

Section 6(b) line 3 (page 15) "March 21" should be "March 31".

Section 6(b)(3) requires the Secretary to assign a blood quantum to persons electing to become enrolled members of the Hoopa Valley Tribe. We recommend the following clarifying amendment:

Section 6(b)(3) line 23 (page 15) should be amended to read: "The Secretary shall determine the quantum of "Indian blood" or "Hoopa Indian blood", if any, of each person enrolled in the Hoopa Valley Tribe under this subsection pursuant to the criteria established in the March 31, 1982 decision of the U.S. Court of Claims in the case of *Jessie Short et al. v. United States*, (Cl. Ct. No. 102-63)".

Section 6(c)(2) line 17 (page 16) should be amended for clarity and consistency with subsection (b)(3). After "shall" delete "assign each person that quantum of "Indian blood" as may be determined" and insert "determine the quantum of "Indian blood", if any,".

Section 6(c)(3) lines 22 and 23 (page 16) should be amended to read as follows:

> "(c) The Secretary shall pay (subject to section 7 of the Act of October 19, 1973, as amended (25 U.S.C. 1407)) to each person".

Section 9 provides for a procedure for the organization of the Yurok Tribe. We believe an interim council should be elected for the primary purpose of drafting a constitution. The Secretary should provide services until the tribe has a constitution and an officially elected tribal council. We recommend the following amendments:

Section 9(c) line 10 (page 19) change "30" to "60".

Section 9(c)(3) line 12 (page 20) change "45" to "60".

Section 9(d)(2) line 6 (page 21) should be amended as follows:

> "(2) The Interim Council shall represent the tribe to assist the Secretary in determining the needs and appropriate programs for the tribe. The Council shall be responsible for determining appropriate use of the funds available to the tribe under section 4(a) of this act."

Delete paragraph "(3)" and renumber "(4)" as "(3)".

Renumber paragraph "(5)" as "(4)" and on line 1 (page 22) delete the words "or at the end of two years after such installation, whichever occurs first".

Section 10 allows the merger of existing Rancherias with the Yurok Tribe. There is no Tolowa Rancheria so that reference should be deleted. We also recommend that since the names listed in this section are names of Rancherias and not names of Tribes that the section be amended to reflect that difference.

Section 10(b) line 23 (page 22) should be amended to add "any of the following Rancherias at" after "members of". Delete "the" after the word "of".

Section 10(b) line 24 (page 23) after "Elk Valley" delete "or Tolowa Rancherias".

Section 11 provides for the addition of a member of the Karok and Yurok Tribes to the Klamath River Basin Fisheries Task Force.

The Secretary is to appoint the member for the Yurok Tribe until the Tribe is recognized. Since the tribe is already

Federally recognized we recommend this provision be changed to refer to the tribe's organization.

Section 11(b) line 23 (page 23) delete "established and federally recognized" and insert "organized".

Section 11(b) line 2 (page 24) change "recognized" to "organized".

Add a new section 14 at the end of the bill as follows:

"Sec. 14. This Act (except sections 2(a) and 12) shall be effective upon partitioning of the reservation as provided in section 2(a). Sections 2(a) and 12 shall be effective upon enactment."

STATEMENT OF RODNEY R. PARKER, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee, on behalf of the Department of Justice, I am pleased to have this opportunity to present our views on S. 2723, legislation to partition reservation lands between the Hoopa Valley Tribe and the Yurok Indians, as introduced by Senator Cranston. This bill, which is identical to the amended version of H.R. 4469 introduced by Congressman Bosco, satisfies our litigation concerns. However, because of budgetary and other policy concerns, we defer to the Department of the Interior for the Administration's position on the bill.

In 1876, a 12-mile square tract of land in Northern California (the Square), occupied mainly by Hoopa Indians, was set aside by President Grant as the Hoopa Valley Indian Reservation. In 1891, President Harrison extended the boundaries of the Reservation to include the adjoining 1-mile wide strip of land on either side of the Klamath River (the Addition or Extension) which was occupied mostly by Yurok Indians.

Beginning in the 1950's, the Hoopa Valley Tribe, a federally recognized and organized tribe, began receiving

proceeds from the harvesting of timber from the Square. Some of the proceeds from the timber harvests were distributed on a per capita basis to individual members of the Hoopa Valley Tribe. This prompted suits by other Indians who were not members of the tribe and thus did not receive per capita payments. *Short v. United States*, No. 102-63, Cl.Ct.; *Ackley v. United States*, No. 460-78, Cl.Ct.; *Aanstadt v. United States*, No. 146-85L, Cl.Ct.; *Giffen v. United States*, No. 746-85L, Cl.Ct.

In these cases, the United States Claims Court held, contrary to the government's position, that the Square and the Extension were a single reservation and that all Indians of the Reservation were entitled to share in a money judgment based on past distributions of individualized monies, i.e. the per capita payments. Since the initial ruling in 1973, efforts have been made to identify the qualified plaintiffs, to settle the litigation and to mediate the dispute which is focused on the conflicting positions of the organized Hoopa Valley Tribe and the federally recognized but not organized Yurok Tribe.

S. 2723 would provide for the partition of the Hoopa Valley reservation into two separate reservations, to be held in trust by the United States for the Hoopa Valley Tribe and the Yurok Tribe, respectively. The bill also provides for the establishment and distribution of a Settlement Fund for eligible individuals.

The Department of Justice has worked with Congressman Bosco's staff to draft legislation that satisfied our litigation concerns. S. 2723, which is identical to the amended version of H.R. 4469, would, in general, satisfy our litigation concerns.

We have, however, two remaining concerns with the bill. Our first concern is clarification that no Fifth Amendment taking is intended by the sections providing for the contribution of tribal monies to the Settlement Fund. The bill already provides for a waiver of claims by the Hoopa Tribe and, under certain circumstances, the Yurok Tribe. While we understand the waiver language as already evidencing tribal consent, we think a provision requiring express tribal consent could provide

a clearer acknowledgment by the tribal government that no taking has occurred. We therefore suggest that section 2(a)(2)(A) be changed to read as follows:

> (2)(A) The partition of the joint reservation as provided in this subsection shall not become effective unless, within 60 days after the date of the enactment of this Act, the Hoopa Valley Tribe shall adopt, and transmit to the Secretary, a tribal resolution:
>
> (i) waiving any claim such tribe may have against the United States arising out of the provisions of this Act, and
>
> *(ii) affirming tribal consent to the contribution of Hoopa Escrow monies to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this Act.*

We likewise suggest that section 9(c)(2)(A) be changed to read as follows:

> (A) the adoption of a resolution, by a vote of not less than two-thirds of the voters present and voting:
>
> (i) waiving any claim the Yurok Tribe may have against the United States arising out of the provision of this Act, and
>
> *(B) [sic] (ii) affirming tribal consent to the contribution of Yurok Escrow monies to the Settlement Fund, and for their use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in this Act.*

Our second concern involves section 13(c)(2) of the bill, which provides that, in the event of a judgment against the United States based on a Fifth Amendment taking, the Secretary of the Interior shall submit a report to Congress recommending possible Congressional modifications to the bill. Pursuant to this section, Congress could change the nature of the act that constituted a taking, and thus make payment for a permanent

taking by the United States unnecessary. In order to ensure that payment is not made in the event that Congress takes action to make the payment unnecessary, we suggest that the following provisions be added to section 13(c)(2) of the Act:

> Notwithstanding the provisions of 28 U.S.C. 2517, any judgment entered against the United States shall not be paid for 180 days after the entry of judgment; and, if the Secretary of the Interior submits a report to Congress pursuant to this section, then payment shall be made no earlier than 120 days after submission of the report.

The bill's remaining provisions largely involve budget and policy matters and we defer to the Department of the Interior on them. I would be pleased to answer any questions you might have.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of Rule XXVI of the Standing Rules of the Senate, the Committee notes that changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

ACT OF JUNE 25, 1910, AS AMENDED

* * * *

[Sec. 7. The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to the

Act of February 14, 1920, as amended (25 U.S.C. 413), shall be used for the benefit of Indians who are members of the tribe or tribes concerned in such manner as he may direct.]

Sec. 7. Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. 413), the proceeds of the sale shall be used -

(1) as determined by the governing bodies of the tribes concerned and approved by the Secretary or

(2) in the absense [sic] of such a governing body, as determined by the Secretary for the tribe concerned.

* * * *

ACT OF OCTOBER 27, 1986
(100 Stat. 3086; 16 U. S. C. 460ss)

* * * *

Sec. 4. Klamath River Basin Fisheries Task Force

* * * *

(c) Membership and appointment. The Task Force is composed of [12] *14* members as follows:

* * * *

(11) A representative of the Karuk Tribe, who shall be appointed by the governing body of the tribe.

(12) A representative of the Yurok Tribe, who shall be appointed by the Secretary until such time as the

Yurok Tribe is established and Federally recognized, upon which time the Yurok Tribe shall appoint such representative beginning with the first appointment ordinarily occurring after the Yurok Tribe is recognized. History Aboriginal Tribers [sic] *and Lands of Northern California.*